(4)

No. 88-5050

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

DANIEL HOLLAND,

Petitioner

v.

ILLINOIS,

Respondent

On Writ of Certiorari to the Supreme Court of Illinois

JOINT APPENDIX

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PETITION FOR WRIT OF CERTIORARI FILED JUNE 3, 1988
CERTIORARI GRANTED FEBRUARY 27, 1989

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CHRONOLOGICAL LIST OF RELEVANT DOCKET ENTRIES

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July 15, 1981	State use peremptory challenges to remove both black prospective jurors to which counsel objects but which objection, after hearing, is denied.
July 19, 1981	Jury convicts petitioner of rape, deviate sexual assault, aggravated kidnapping, and armed robbery
August 20, 1981	Court sentences petitioner to concurrent and consecutive terms of imprisonment
December 4, 1981	Petitioner is allowed to file late notice of appeal
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IN THE CIRCUIT COURT OF
COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT-MUNICIPAL DIVISION
THIRD DISTRICT

ILLINOIS

v.

DANIEL HOLLAND

JURY SELECTION PROCEEDINGS

July 15, 1981

[529] THE COURT: Kindly move down, ladies and gentlemen.

THE CLERK: 2102.

MS. CONLEY,

a prospective juror, was examined as follows:

EXAMINATION

By the Court:

Q Ma'am, what is your name?
A Conley.
Q That's C-o-n-l-e-y?
A Right.
Q Miss Conley, you reside in Chicago, Illinois?
A Right.
Q How long have you lived at that address?
A Six years now.
Q And with whom do you reside there?
A Parents.

Q And you're a student?
A No, not now. I graduated in June.
Q And what school did you attend?
A Northeastern.
Q And please raise your voice a little more.
A Northeastern.
Q And what degree did you get?
[530] A A B.S.
Q What is the nature of your parent's employment?
A They work at the Rockford Paper Mills. My father's in maintenance, and my mother packs boxes in the packing department.
Q Thank you. And you have never served as a juror before, is that correct?
A No, I haven't.
Q And Miss Conley, do you know any of the lawyers?
A No.
Q Do you know the defendant?
A No, I don't.
Q Have you heard or read anything about this case?
A No, I haven't.
Q Do you have any friends or relatives on any police force or in the State's Attorney's Office?
A No.
Q Have you or any member of your family, any close friend, ever been the victim of a crime?
A No.
Q Is there anything about the nature of the charges in this particular case that in any way would prevent you from rendering a fair and impartial verdict in this case if you were selected as a juror?
[531] A No.
Q Do you have any bias or prejudice against a person simply because he is charged with a crime?
A No, I don't.
Q As you sit there right now, Miss Conley, do you know of any reason whatsoever why you could not render

a fair and impartial verdict in this case if you were selected as a juror?

A No.

Q Thank you, Miss Conley.

Mr. Bredemann?

MR. BREDEMANN: People would excuse Miss Conley.

THE COURT: Miss Conley would you kindly report to the officer, please?

THE CLERK: 1637.

MR. BREDEMANN: Thank you, Ma'am.

THE COURT: Please move down, ladies and gentlemen.

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[558] VIRGIL MOSLY,

a prospective juror, was examined as follows:

EXAMINATION

By the Court:

[559] Q May we have your name?

A Virgil Mosly, Jr.

Q Mr. Mosly, kindly keep your voice up. That's M-o-s-l-y?

A Yes.

Q Mr. Mosly, you reside in Chicago?

A Yes.

Q How long have you lived there at that address?

A Three months.

Q And before that, Mr. Mosly, did you also reside in Chicago?

A Yes.

Q How long were you at your last address?

A Eleven years.

Q Thank you. With whom do you reside?

A My wife.

Q And you work for Polk Brothers as an inventory clerk?

A Yes.

Q How long have you been with Polk Brothers, please?

A About two months.

Q And before that, what was the nature of your employment?

[560] A I was in school.

Q What school is that?

A Northeastern.

Q And what was your major, please?

A I was just a general student.

Q And how long were you at Northeastern, please?

A About half a year, one semester.

Q And it appears that your wife is with Allstate Insurance in a clerical capacity, is that correct?

A Yes.

Q How long has she been in that capacity?

A A year and a half.

Q Mr. Mosly, do you know any of the lawyers?

A No, sir.

Q Do you know the defendant, Mr. Holland?

A No, sir.

Q Have you ever heard or read anything about this case?

A No, sir.

Q Have you any friends or relatives in the State's Attorney's Office or any police force?

A No, sir.

Q Mr. Mosly, do you have any bias or any prejudice against a person simply because he is charged with a crime?

[561] A No, sir.

Q And is there anything about the nature of the charges in this particular case that would cause you to feel that you couldn't be fair and impartial in this case?

A No, sir.

Q Now, sir, you indicate that a member of your immediate family or very close friend had been the victim of a crime.

A Yes.

Q Would you please tell us who that was?

A It was a friend of mine. It was a victim of a murder.

Q I see. When was that, sir?

A About three weeks ago.

Q And that was in Chicago?

A Yes.

Q Is there anything about that very tragic experience that in any way could cause you to feel that you could not be fair and impartial in this case?

A No, sir.

Q Have you or any member of your family or a close friend ever been accused of a crime?

A No, sir.

Q As you sit there right now, Mr. Mosly, can you [562] think of any reason whatsoever why you could not render a fair and impartial verdict in this case if you were selected as a juror?

A No, sir.

Q Thank you, Mr. Mosly.

• • • •

[565] THE COURT: Mr. Bredemann? Ms. Keenan?

MS. KEENAN: We excuse Mr. Mosly.

THE COURT: Very well.

Mr. Mosly, kindly report to the officer, sir.

THE CLERK: 1636.

MR. ROCCO: Thank you, Mr. Mosly.

MR. BREDEMANN: Thank you, sir.

• • • •

[Supp. II 2] THE COURT: Counsel, we will hear arguments, now, on your motion for exclusion. I will hear that now. There's no reason to waste this time. It's valuable and I will hear it, now.

MR. ROCCO: Your Honor, I thought we'd wait until we saw the other array of jurors.

THE COURT: No, we're going to hear that, now. We'll hear the arguments in open court.

MR. BREDEMANN: Judge, we've had the witnesses sitting here all day. Can I have ten minutes?

THE COURT: Yes. I want you back. I'm not going to waste any of this valuable time. We have a good afternoon.

Defendant may remain with his counsel. I will have forty jurors here. I'm sure we'll be able to get somebody.

(Whereupon a recess was taken, after which the following proceedings were had outside the presence and hearing of the prospective jurors:)

THE COURT: Do you wish your client present, Counsel?

MR. ROCCO: Yes, your Honor.

[Supp. II 3] THE COURT: All right.

(Whereupon a short pause ensued as the defendant entered the courtroom, after which the following proceedings were had herein:)

THE COURT: Now, the record shall indicate the defendant's present in court; defense counsel is present. Of course, we're outside the presence of any prospective jurors or any jurors; and the State's Attorney is present.

The record shall reflect that defense counsel's filed a motion—

Counsel, would you reiterate your motion for the record?

MR. ROCCO: Yes, your Honor. I made an oral motion to object to the systematic exclusion of blacks by the State. At yesterday's hearing, I believe there was—if my memory serves me correctly—thirty prospective jurors brought in. I may be off one or two. Out of those thirty, there were only two blacks that were brought up.

I had previously argued that the defendant has a right to be—to a jury to be drawn from a representative cross section of the community [Supp II 4] and be tried by

a representative cross section of the community. The State has systematically excluded the two blacks. It did not even ask them one question; just took one look at them and excused them pursuant to their right to a peremptory challenge.

My motion, Judge, is not that of a mistrial, it's for the County of Cook to provide me with some blacks out of thirty-five—

THE COURT: Are you suggesting that the jurors be hand-selected by race, Counsel, and sent here in ratios or quotas?

MR. ROCCO: No, your Honor. I'm saying I don't know what pool they select these from.

THE COURT: Are you challenging the basis, Counselor, of how jurors are selected?

MR. ROCCO: I'm not selecting the array, your Honor. What I'm stating is this: that my client is entitled to a representative cross section of the community. I don't know how they've selected them. What I'm saying is this: that I'm raising the objection because in this district it appears that only whites are selected on some basis and no blacks are available to a defendant.

THE COURT: You made that conclusion, Counsel, [Supp. II 5] because two black jurors were here out of forty?

MR. ROCCO: That's correct.

THE COURT: Is that the basis for your conclusion, Counselor?

MR. ROCCO: Right, your Honor.

THE COURT: Okay.

Mr. State's Attorney, do you wish to respond to two arguments: one, an alleged systematic exclusion by you in excusing Miss Conley (phonetically spelled) and Mr. Mosely (phonetically spelled) yesterday, who were prospective jurors; and the general selection of jurors being incident to this district?

MR. BREDEMANN: Yes, Judge. The second point, I think, is moot. The time to challenge the array is when

it's brought in and not subsequently. I think it's untimely.

As to the first point, this elimination or this exemption from jury duty by the use of our peremptory challenge, was not based upon their race. That was not the intent of the State in doing so.

Secondly, I believe Justice Rehnquist addressed this problem approximately five years ago in an opinion and I believe his conclusion, in that particular matter, I think deals with this issue. [Supp. II 6] It's a question of constitutional law; therefore, I believe his motion should be denied.

THE COURT: Very well.

Counsel, it's your motion. Do you have anything further to say?

MR. ROCCO: Your Honor, I would just state this: that in the People vs. Wheeler, a 1978 California case, *583 Pacific 2nd 748*, it involved where the defendants were black. However, the same type of argument can be made where the defendant is white.

There's also the Commonwealth vs. Soares, a 1979 Massachusetts case, *387 Northeast 2nd 499*. The holding in those two cases was the same: the use of peremptory challenges to remove prospective jurors on the sole basis of group bias—meaning race—violates the right to trial by a jury drawn from a representative cross section of the community, specifically in Article 1 Section 6 of the California Constitution, which guarantees an accused the inviolate right to trial by jury.

We also relied on Taylor, a 1955 case, *419 U.S. 522*, which extended to the State through the Fourteenth Amendment the representative cross section requirements of the Sixth Amendment.

[Supp. II 7] The Soares decision relied on the language in Wheeler and on the cross section requirements of Taylor.

More specifically, the Court in Soares found the prosecutor's conduct a contravention of Article 12 of the

Massachusetts Declaration of Rights which guarantees the right to a trial by a jury of one's peers. Here in our case the defendant has an identical protection under the Sixth Amendment against the systematic removal of blacks from the venire.

Furthermore, Article 1 Section 8 of the Illinois Constitution corresponds closely to the language of the Sixth Amendment, as well as to the articles of the California and Massachusetts Constitutions which were relied upon to reverse the defendant's conviction. This is in Soares and Wheeler.

After reviewing the protections offered by the Federal and State Constitutions in favor of a jury drawn from a cross section of the community, the Wheeler Court suggested a method for determining whether jurors were eliminated on the basis of their group race, rather than because of any specific bias. The method suggested in Wheeler and adopted in Soares included a review of the facts to show, number one, [Supp. II 8] that the prosecutors struck most or all of the members, cognizable group from the venire.

In this, our case, your Honor, it was only two. He struck both of them.

Two, that he used a disproportionate number of peremptory challenges against group members. He used two of them to strike the only two.

That the jurors shared only one characteristic, the ones that were stricken, the black race, as it was in Wheeler or Soares.

I ask the Court to recall what the prosecutor did in our case. The prosecutor failed to engage the jurors in more than a desultory voir dire. In our case there was no voir dire. The prosecutor looked at the prospective jurors that were black, went up to your Honor and said, "I—we—the State excuses these people." That was Miss Conley and Mr. Mosely, the only two blacks.

Applying these guidelines to the facts of the instant case, it's evident that the jurors were eliminated solely

because of their black race. Actually, Judge, we didn't get really into what their background was, as I recall. I would have to consult my notes to determine their backgrounds.

THE COURT: I also have my notes, Counsel.

MR. ROCCO: They were just ordinary people, as I recall; nothing unusual about them. Nothing that—

THE COURT: Didn't Mr. Mosley have a friend who was murdered approximately three months or three weeks just immediately prior to his questioning as a juror?

MR. ROCCO: Right, and if that was the case, your Honor, that would seem, by inference, that it would favor the State more than the defense.

THE COURT: However, it is a factor that was revealed. Who it may ultimately avail itself to is yet to be seen, of course.

MR. ROCCO: But I'm talking about his background, Judge. That's something that's up to conjecture, but not the fact that he's a college student. I think he was working. He appeared to be a clean-cut individual.

THE COURT: Yes, Counsel, you're assuming, again, that there was some individual basis. All right, you're talking, again, about individual characteristics as opposed to being systematically excluded. That would, apparently, not be relevant if it were a systematic exclusion.

MR. ROCCO: The one characteristic was their race, your Honor.

[Supp. II 10] THE COURT: All right.

MR. ROCCO: It was obvious that counsel did not even consider what their background might be when he used his two challenges. It would only lead the defense to conclude that these black jurors were eliminated simply because of their race and not any specific bias. It would be hard to come by, Judge, to believe that the State would excuse somebody who had a friend that was murdered.

THE COURT: Very well, Counselor. I've considered your motion. Do you have anything in addition?

MR. ROCCO: Consequently, Judge, the prospective jury, so far, has not been a representative cross section

of the community and my defendant's Sixth Amendment right to a jury trial has been violated, as well as his right to an impartial jury under the Illinois Constitution.

THE COURT: So, what's the bottom line, Counsel? What are you seeking?

MR. ROCCO: I'm asking the Court that if—you know, I don't know what way this is—we have not had any other races here except white.

THE COURT: I see.

MR. ROCCO: Okay?

[Supp. II 11] THE COURT: I see.

MR. ROCCO: And I think—

THE COURT: Is that your argument, Counselor?

MR. ROCCO: —my man actually has a right to a cross section of the community.

THE COURT: You assume there's, apparently, a conspiracy to deprive him of anything other than Caucasian members?

MR. ROCCO: I'm not making such a representation.

THE COURT: Just be very specific in your argument.

MR. ROCCO: I'm trying to be, Judge; I'm trying to be.

THE COURT: Fine. Don't make allusions; be specific. Tell me, if, in fact, you feel something is being done.

MR. ROCCO: I didn't mention conspiracy.

THE COURT: No, but you're indicating there's no other minority other than Caucasians.

MR. ROCCO: I'm saying whatever method is used for this, I'm asking the Court to investigate it and if, within the Court's power, to secure thirty-five people for tomorrow morning, that truly represent the cross section of the community.

THE COURT: Are you asking this Court to hand-pick jurors that may, in your view, Counselor, constitute [Supp. II 12] a cross section? In other words, so many of each particular ethnic background?

MR. ROCCO: I'm asking for a cross section of the community, not any particular number. Whatever is there.

THE COURT: Do you have anything further, now, Counsel?

MR. ROCCO: That's all, your Honor.

THE COURT: I've considered your argument and I've seen the jurors come here. I see absolutely not a scintilla of the basis for your—to support your argument.

As a matter of fact, I have considered People vs. Wheeler. That's reported, also, at *22 California 3rd 258*. They allowed the defendant to establish a prima facie case of discrimination and shift the burden merely upon that allegation, and it makes the State show that they were—why they were discriminatory. In other words, it puts the burden upon the State to establish by testimony that they had not been discriminatory; except Illinois expressly rejects that California doctrine.

I bring both counsels' attention to these cases: first, People vs. Fleming, a First District [Supp. II 13] case decided November of 1980 at *91 Illinois Appellate 3rd 99*. There the State exercised a peremptory challenge against a black juror but that is not violative of the constitutional rights of an impartial jury in a felony prosecution against the black defendant.

The defendant in this case is Caucasian. The State has ten peremptory challenges. The defense has ten peremptory challenges. This is a penitentiary offense and that's the statutory allotment.

The State, at the time it excused Mr. Mosley, that was the State's fifth challenge. Mr. Mosely was their fifth.

Miss Conley, apparently, was the third. Miss Conley and Mr. Mosley were both excused.

This Court has conducted a voir dire of all of the jurors, including not only Mosley and Conley, but each and every one of the others, all forty, before I permitted and exercised my permission to permit the State and defense to have any voir dire whatsoever pursuant to Jack-

son. It's purely in my province, but I chose to have you have a voir dire. After I voir dired everyone, the State elected to exclude those two.

The State subsequently used all ten of [Supp. II 14] their peremptory challenges; the defendant merely five. So, the basis I have to assume was after they had an opportunity to reflect upon the voir dire, that voir dire I asked, and record is complete as to what was asked: where they reside; how long they resided there; their education; whether or not they had any bias or prejudice; who they reside with; the nature of their employment; how long they had been in that employment; whether or not the spouse is employed. And the record is replete with the nature of the inquiry that this Court conducts and I regard it to be rather thorough.

Now, People vs. Fleming based part of their opinion—also a case called *Swain vs. Alabama, 965, reported at 380 U.S. 202*. That holds where there's no showing of a systematic exclusion of a particular racial group from sitting on juries, prosecutors' motives may not be inquired into when he excludes members of that group by use of his peremptory challenge. There is a presumption that the prosecutor is using the State's challenges to obtain a fair and impartial jury to try the case before the Court.

And in the Illinois Courts in Fleming—and they incorporated Swain vs. Alabama—expressly [Supp. II 15] rejected California Supreme Court rationale that you alluded to in People vs. Wheeler.

I might also point out, Counsel, that there are two other cases: People vs. King, 1973, by our Illinois Supreme Court at *54 Illinois 2nd 291*; and People vs. Butler, 1970 at *46 Illinois 2nd 162*; also by our Illinois Supreme Court, and a third case, People vs. Harris, 1959, our Illinois Supreme Court at *17 Illinois 2nd 446*.

Based upon a totality of the arguments that I have heard, your oral motion which I will give you leave to reduce to writing, Counselor, the State's response, my observations of the witnesses, the voir dire that I conducted, the points and authorities I rely upon, your motion being and the same hereby is denied and denied in toto and all respects.

Now, this cause stands adjourned until tomorrow. I expect both sides to be ready. We will have enough jurors to proceed.

(Whereupon said matter was continued until Thursday, the 16th day of July A.D. 1981.)

ILLINOIS APPELLATE COURT
FIRST DISTRICT
FIFTH DIVISION

August 29, 1986

81-2895

PEOPLE OF THE STATE OF ILLINOIS,
Plaintiff-Appellee

vs.

DANIEL HOLLAND,
Defendant-Appellant

Appeal from the Circuit Court of Cook County

Honorable Edward M. Fiala, Judge Presiding

JUSTICE PINCHAM delivered the opinion of the court:

Following a jury trial, defendant was found guilty and was sentenced to concurrent, extended terms of imprisonment of 60 years for rape, 60 years for deviate sexual assault and 30 years for aggravated kidnapping. Defendant was also sentenced to a consecutive, extended term of 25 years for armed robbery. The trial court ordered that these sentences were to be served consecutive to any sentence the defendant would receive as a result of any parole violation.[1]

[1] Some years previous, defendant was convicted of armed robbery and was sentenced to six to 18 years' imprisonment, of which he served three years and was on parole when the above offenses were committed and the sentences imposed.

On appeal, defendant urges for reversal that: (1) he was denied his constitutional right to a jury drawn from a fair cross-section of the community; (2) his confession should have been suppressed; (3) the element of force in the armed robbery was not proven; (4) the consecutive sentences were improper; and (5) defendant was denied effective assistance of counsel.

The complainant's testimony at trial revealed that on May 4, 1980, at approximately 12:00 midnight, the complainant and her boyfriend left a party, riding in her boyfriend's car. The complainant drove. The car suddenly had a flat tire and the complainant pulled the car over to the shoulder of the road. They discovered that the spare tire was also flat. After waiting an hour for assistance, the couple decided to sleep in the car. They awakened at dawn and began to walk on the shoulder of the road. Shortly afterward, defendant pulled up in his car, asked what was wrong, and offered to give the complainant and her boyfriend a ride home. Accepting the invitation, the couple got in defendant's car. The complainant sat in the front seat and her boyfriend sat in the back seat.

After driving for a while, defendant pulled off the road and stopped the car, he grabbed the complainant, brandished a knife against her throat, ordered the boyfriend to get out of the car, and threatened to kill them if the boyfriend did not do so. The complainant's boyfriend got out of the car. The complainant pleaded with the defendant to release her. The defendant said he would let her go when he was through with her. He pulled her nearer to him and continued driving while holding the knife under the complainant's arm. Defendant then pulled his car into a parking lot. The complainant was ordered to take off her clothes or get "cut up." As the complainant disrobed, the defendant cut her brassiere and forced her to perform an act of oral copulation.

During this ordeal, defendant complained that the complainant was not sexually performing the way he wanted and he cut the complainant's upper thigh with his knife. The complainant testified that the defendant threatened to kill her if she did not do what he wanted. They got back in the car.

The defendant continued driving. The defendant then pulled into an alley where he and the complainant again got out of the car. The defendant forced the complainant to have intercourse with him twice and to perform oral copulation on him. The complainant testified that she did not attempt to leave nor did she cry out for help because she was only partially clothed. The defendant took the complainant's money (approximately $60), driver's license and school identification card and threatened to kill her if she reported the incident to the police. The defendant then allowed the complainant to get dressed outside the car and leave. The complainant testified that as she walked away she turned and noticed that the defendant's car did not have a rear license plate. The complainant ran to a grocery store where she used the washroom and called home. Her brother came to pick her up and immediately drove her to a police station. After reporting the incident to the police, the complainant was taken to a hospital. From the hospital, the complainant was driven to the places she had been taken by the defendant and then went back to the police station where she identified the defendant's picture from a group of photographs.

During the time the complainant was with the defendant, the complainant's boyfriend called the police. The police radioed a description of the defendant and the type of car he was driving. Defendant was arrested at about 8:15 a.m. when he was stopped by the police for driving without a rear license plate. The defendant did not have a valid driver's license. He was taken to the Schiller Park police station where a hunting knife, the

complainant's high school identification card and $58.00 were taken from him.

The defendant was taken from the Schiller Park police station to the Des Plaines police station where he was interviewed by two assistant State's Attorneys and a police officer. At approximately 2:30 p.m. at the Des Plaines station, the defendant confessed to sexually assaulting the complainant.

Prior to trial, the trial court sustained defendant's motion to suppress the defendant's initial confession made at the Schiller Park police station. The court found that "there was physical confrontation between the Schiller Park police officers and the defendant. Under the circumstances, when it was that this occurred, it is not really necessary for me to make a determination * * *. I feel that that degree of physical confrontation contaminates any statements defendant would have made at the Des Plaines police station were denied."

Defendant contends that his constitutional right to a jury drawn from a fair cross-section of the community was denied because a disproportionately small number of blacks were available for *voir dire* jury selection. Over 40 jury veniremen, of whom two were black, were assembled, from which the jury was selected. The State used two peremptory challenges to excuse the two blacks and 10 peremptory challengers to exclude white jurors. There were no black members of the jury. Defendant is Caucasian.

The State contends that defendant failed to preserve this issue for review by failing to raise an objection prior to the *voir dire* examination. The State points out that Ill. Rev. Stat. 1981, ch. 38, par. 114-3 (a) and (b) provides:

> "(a) Any objection to the manner in which a jury panel has been selected or drawn shall be raised by a

motion to discharge the jury panel prior to the voir dire examination. * * *.

(b) The motion shall be in writing supported by affidavit and shall state facts which show that the jury panel was improperly selected or drawn."

The State contends that (1) contrary to the requirements of this statute, defense counsel made an objection to the jury array *after* the *voir dire* examination had begun and a panel of jurors sworn in; (2) although the court granted defense counsel leave to file a written motion, defense counsel failed to do so; (3) there is no written motion in the record, supported by an affidavit, challenging the selection of prospective jurors; and (4) defendant's motion for a new trial failed to raise the issue of the alleged improper jury array.

The question of whether it is a constitutional violation for the State to use its peremptory challenges to systematically exclude blacks from the jury solely because of their race was recently decided on April 30, 1986 by the United States Supreme Court in *Batson v. Kentucky* (1986), —— U.S. ——, 90 L. Ed. 2d 69, 106 S. Ct. 1712. In that case, the Supreme Court held that the Equal Protection Clause of the fourteenth amendment forbids the State through its use of peremptory challenges from excluding jurors solely on account of race. We do not rule on this issue for the reasons that (1) we reverse the case at bar on other grounds and remand for a new trial; (2) the parties and trial judge in the instant case did not have the benefit of the *Batson* decision when the alleged peremptory challenge improprieties occurred; and (3) with *Batson* now controlling, it is highly unlikely that this issue will recur on retrial.

Defendant next contends that it was error for the trial court to admit his confession because the police failed to inform him while he was in custody at the Des Plaines police station that his attorney, Anthony Rocco, had

called the station in an effort to contact him. At the pretrial hearing on defendant's motion to suppress his confession, Assistant State's Attorney Ira Raphaelson testified for the State that he arrived at the Des Plaines police station between 1 p.m. and 1:30 p.m. and that he interviewed the defendant at about 2 p.m. Assistant State's Attorney Howard Friedman and Officer John Meese were also present at this interview. Raphaelson testified that he told the defendant that he and Friedman were not Public Defenders and that he informed the defendant of his *Miranda* rights. According to Raphaelson, defendant responded that he understood his rights and was willing to talk. Raphaelson further testified that at about 2:30, he, Officer Meese and Assistant State's Attorney Friedman had a second conversation with the defendant, during which time the defendant gave a confession of his involvement in the offenses.

Raphaelson testified that he did not talk to defendant's attorney, Attorney Rocco, until after the defendant confessed and that it was about 3 p.m. when he talked to Rocco on the telephone. Raphaelson testified that Rocco told him "that he had something to do with the family of Daniel Holland," and wanted to know what charges were being filed against his client. Raphaelson told Rocco that he "was not free to divulge that information," and that no decision had been made on what charges would be filed against defendant.

Cross-examination of Raphaelson disclosed that he had a telephone conversation with Officer Bauer of the Schiller Park police station before Raphaelson interviewed the defendant at the Des Plaines station. Raphaelson explained on cross-examination that when the defendant was stopped for a traffic violation, the defendant had a weapon and that Bauer "was seeking charges [against the defendant] for a felony unlawful use of weapons." Later that morning, Raphaelson further testified, he again spoke to Bauer who "indicated * * * that

they believed that Mr. Holland [defendant] was a suspect * * * in a rape matter in Des Plaines." Defendant's attorney, Anthony Rocco, then asked Raphaelson the following questions on cross-examination:

"Q Now, you say you first saw the defendant, Daniel Holland at approximately 2:05 p.m. that day is that right?

A I may have taken a look at him before I spoke to him. It would have been approximately that time.

Q And that is the first time you had a conversation with him, right?

A That is correct.

Q And he didn't ask for any attorney, is that correct?

A No, he did not.

Q *All right, and were you aware of the fact that I was attempting to communicate with Mr. Holland during that point in time*?

A At that point in time, no.

Q Officer Meese never said that to you?

A No, I don't believe so.

Q Officer Meese ever tell you that I talked to him regarding Daniel Holland?

A He probably did mention it." (Emphasis added).

Raphaelson also testified on cross-examination that he interrupted his interview of the defendant and had a conversation in another room. Friedman, the other assistant State's Attorney came back into the interview room and when Raphaelson returned, he resumed his interview of the defendant in the presence of Friedman and Officer Meese. Defendant's attorney, Rocco, again queried Raphaelson on cross-examination as follows:

"Q Did Investigator * * * Meese ever tell you I had phoned at that time?

A No.

Q Did he ever tell you that I asked that I'd be given an opportunity to speak to my client and see him before any interrogation took place? That I had been retained?

A There was some discussion at some point that an attorney or someone claiming to be an attorney had called.

Q Did he ever tell you I left my phone number with him to call me back?

A I don't recall.

Q Did he ever tell you the name of the person who claimed to be the attorney for Daniel Holland?

A No."

Testifying further on cross-examination, Raphaelson stated that he concluded the interview of the defendant at about 2:55 and that at approximately 3:00 he talked on the telephone to Rocco, who had called the Des Plaines police station. Raphaelson testified that Rocco may have told him in this telephone conversation that defendant's family wanted him to represent the defendant but that the only inquiry Rocco made to Raphaelson was to ask what charges would be brought against the defendant. Raphaelson testified that he again talked to Rocco, this time in person, at about 3:45 p.m. in the lobby of the Des Plaines police station. Raphaelson told Rocco what charges Raphaelson had approved to be brought against the defendant, which charges he approved between 3:30 and 3:45 p.m.

Detective Meese of the Des Plaines police station next testified for the State at the pretrial hearing on defendant's suppression motions. Meese stated that he talked to defendant's attorney, Anthony Rocco, between noon and 12:15 and that Rocco requested that he be notified if the defendant was transported to the Des Plaines police station for a lineup. Meese said that Rocco asked whether defendant had been charged with an offense in Des Plaines and that Meese answered "no," Meese

testified he called Rocco's home between 2:30 and 2:45 p.m. to notify Rocco that a lineup would be held, but Rocco was not home.

On cross-examination, Rocco asked Meese whether he recalled that Rocco had asked, "Please call me as soon as Mr. Holland arrives at the station." Meese answered, "You requested to be called if he was transported to our station and was going to be put into a lineup." The following cross-examination occurred:

"Q And you said you tried to call me about 2:35 to 2:45 that afternoon, is that correct?

A That is correct.

• • • •

MR. ROCCO: Were you aware of the fact *I called the police department also at 2:00 o'clock p.m. that day*?

A No, I'm not.

Q Were you informed of the fact *I formally requested to speak to my client at that time again*?

A No, I was not.

Q And were you aware of the fact that your department told me that my client was being processed and could not come to the telephone?

A I'm not aware of that.

Q Were you aware of the fact that *I again formally requested that the law authorities present in the station not interrogate my client until I was present and had an opportunity to confer with my client beforehand and during any interrogation*?

A I'm not aware of that.

Q Are you aware of the fact that I arrived at that station at 3:47 p.m. that day?

A No, I'm not.

Q Were you aware of the fact that I asked to see my client, formally requested to see and speak with him and was told that I would have to go into a waiting room and wait ten to twenty minutes before he came out?

A I'm not aware of that.

Q Were you aware of the fact I had to interview my client in a small room through a glass wall and speak to him through metal grating?

MR. BREDEMANN [assistant State's Attorney]: Objection.

THE COURT: Basis?

MR. BREDEMANN: Irrelevant, Judge, after the statement.

THE COURT: I'm going to leave it in, if he knows. Overruled. You may answer.

THE WITNESS: I'm not aware of where you talked to the man." (Emphasis added.)

After the State rested on the hearing of defendant's motion to suppress his statements, defendant was given leave to reopen the hearing. Defendant called to testify Schiller Park police officer Robert Bauer, who arrested the defendant, Patricia Holland, defendant's wife, and defendant Daniel Holland. Defendant's attorney, Anthony Rocco, also testified at this time.

Rocco stated that on May 4, 1980 at about 3:47 p.m., he went to the Des Plaines police station and asked to see the defendant. Rocco said he "was ushered into this little room. [The defendant] was brought in on the other side of the glass. • • • I detected that he had a limp when he came into the room. • • • I introduced myself to him, because this was the first time I had ever met him. He introduced himself to me." Rocco testified that the defendant started to complain about his chin and said he had been beaten in the Schiller Park police station, had been hit "in areas where he could not be seen" and that his ribs were hurting him. Rocco said the defendant told him that "they" had beaten him on his right knee with a billy club or a night stick and when Rocco asked to see the injury, defendant rolled up his

pants to reveal his right knee which "was really discolored quite a bit." Rocco said defendant was taking pain pills.

Following Attorney Rocco's testimony, he and Assistant State's Attorney Bredemann argued defendant's motion to suppress defendant's confession and the evidence seized from him when he was arrested. During Rocco's argument, Rocco again accused the officers at the Schiller Park station of beating the defendant and Officer Meese of not honoring Rocco's request to be present during any interrogation of defendant.

In ruling on defendant's motion, the trial court stated:

> "[T]here is no question that some degree of confrontation took place in Schiller Park because the officers in those cases are complainants, and there is no question that the defendant apparently sustained some injury. Whether or not he sustained those in being apprehended as a consequence of the particular traffic stop in that instance, or whether he was beaten shall be for me to weigh upon, but there was physical confrontation between the Schiller Park police officers and the defendant. Under the circumstances, when it was that this occurred, it is not really necessary for me to make a determination.
>
> I find, and I do find that inasmuch as there was a physical, apparently very severe physical confrontation from that night, had obtained leave and obtained a complaint, and have filed information alleging aggravated battery.
>
> Defense counsel observed physical injuries to the right knee of the defendant, and signs defendant's complaint after 3:47 on May 4, 1980 at the Des Plaines police station.
>
> I feel that that degree of physical confrontation contaminates any statements defendant would have made at the Schiller Park Police Station, and accordingly any statements made relevant to this cause made by the defendant in the Schiller Park Police Station before this Court are hereby suppressed, and suppressed in toto."

Regarding the defendant's statements he subsequently made at the Des Plaines station, the court found that the defendant had received *Miranda* warnings "in full or in part at least five times, and that he was not a neophyte, he had been exposed to police departments on prior other occasions * * *," and that no physical cruelty was proven to have been exerted by the Des Plaines police. The court denied the defendant's motion to suppress the statements he made at the Des Plaines police station.

Defendant contends that since the trial court found that his statements that were made at the Schiller Park police station were the product of police brutality and therefore involuntary, the trial court should have also found that the brutality and involuntariness carried over to the statements the defendant made shortly thereafter at the Des Plaines police station and that those statements should also have been suppressed. We decline to rule on whether the Schiller Park police brutality carried over to invalidate defendant's Des Plaines police station confession inasmuch as we agree with the defendant's further contention that he did not waive his right to counsel during the custodial interrogation at the Des Plaines station because the police did not tell him that his attorney was trying to reach him.

The Illinois supreme Court has held that the police have a duty to inform a defendant undergoing custodial interrogation of efforts by his attorney to consult with him and that the defendant's statements should have been suppressed if this is not done. (*People v. Smith* (1982), 93 Ill. 2d 179, 442 N.E. 2d 1325.) In *Smith*,

the defendant and an accomplice were arrested shortly before midnight. At 5:30 a.m. the next day, they met with a private attorney who agreed to represent them. Later that morning, they were advised by a judge of the charges against them. The defendant and his accomplice were then transported to another county jail.

At approximately 3 p.m. that same day, another attorney from the original attorney's law firm arrived at the jail where the defendant had been transported. The attorney was denied access to the defendant, because, the jailer told her, the defendant was going through heroin withdrawal. The attorney wrote on one of her business cards that she was the original attorney's partner and that the defendant should not make a statement without one of his lawyers present. Defendant was later interrogated and gave a statement without his attorney being notified.

Reversing this court's affirmance of the defendant's conviction and remanding the cause for a new trial, the Illinois supreme court held that pursuant to the fifth amendment protection against self-incrimination, the defendant's statements given during his interrogation should have been suppressed, based on the defendant's right to counsel during the custodial interrogation. (93 Ill. 2d 179, 185.) Citing the decision in *State v. Haynes* (1979), 268 Or. 59, 602 P. 272, *cert. denied* (1980), 446 U.S. 945, 64 L. Ed. 2d 802, 100 S.Ct. 2175, the court in *Smith* observed that in *Haynes*, the supreme court of Oregon reversed the defendant's conviction on the ground that the trial court should have suppressed the statements obtained after the police had successfully interfered with the attorney's attempt to consult with the defendant. In language applicable to the case before us, the *Haynes* court stated:

> "[W]e agree • • • that when law enforcement officers have failed to admit counsel to a person in custody *or to inform the person of the attorney's efforts to reach him*, they cannot thereafter rely on defendant's 'waiver' for the use of his subsequent uncounseled statements or resulting evidence against him. We believe this rule protects the suspect's right under [the State constitution] and the federal fifth and 14th amendments not to testify against himself." (Emphasis added.) 93 Ill. 2d 179, 187-88, citing 288 Or. 59, 72-74.

The Illinois supreme court in *Smith* held that when police, prior to or during custodial interrogation, refuse an attorney, appointed or retained, access to the suspect, "there can be no knowing waiver of the right to counsel *if the suspect has not been informed that his attorney was present and seeking to consult with him.* (Emphasis added.) (93 Ill. 2d 179, 189.) The court added that although the defendant in *Smith* had received the attorney's business card, without his being informed that the attorney had also requested to confer with him, the card and message were of little value. 93 Ill. 2d 179, 189.

In *Moran v. Burbine* (1986), —— U.S. ——, 89 L. Ed. 2d 410, 106 S. Ct. 1135, Cranston, Rhode Island police arrested Burbine in connection with a local breaking and entering offense. To obtain legal assistance for Burbine, his sister, Sheila Ray, called the public defender's office in search of Assistant Public Defender Richard Casparian, who was representing Burbine on other unrelated charges. Casparian was not in, but Casparian's associate, Assistant Public Defender Allegra Munson, received Ray's call. Ray told Munson about Burbine's arrest and requested the public defender's office to represent Burbine. Munson promptly telephoned the Cranston police station and asked that her call be transferred to the detective division. A man answered, "Detectives." After identifying herself, Munson inquired if Burbine was in custody and upon being advised that he was, Munson told the person that Assistant Public De-

fender Richard Casparian, who represented Burbine, was away from his office and unavailable, but that she would act as Burbine's attorney if the police intended to put Burbine in a lineup or question him. The unidentified male voice told Munson that neither activity was contemplated and that, "we're through with him for the night." Munson did not ask any further questions and did not leave any instructions before she hung up. The unidentified man did not tell Munson that at that very moment, three Providence police officers were at the Cranston station to question Burbine about the murder of Mary Jo Hickey in Providence three months earlier. Burbine was never told of his sister's efforts to obtain counsel for him or of Munson's telephone call to the police station.

Within an hour after Munson's telephone conversation with the Cranston police, the Providence police questioned Burbine about Hickey's murder. Burbine denied any involvement. The officers left him by himself in a small anteroom. Ten minutes later, Burbine summoned the detectives, saying he was "disgusted," "sorry" and wanted to confess. Burbine was informed of his *Miranda* rights and on three separate occasions he signed a written acknowledgement that he understood his *Miranda* rights and waived them. Burbine signed three confessions in which he admitted the murder.

The Supreme Court granted *certiorari* to decide "whether [Burbine's] confession [which was] preceded by an otherwise valid waiver must be suppressed either because the police misinformed an inquiring attorney about their plans concerning the suspect, or because they failed to inform the suspect of the attorney's efforts to reach him." The Court pointed out that although Burbine was fully admonished of his *Miranda* rights, he never requested counsel and that he waived his right to remain silent and to the presence of counsel. The Court stated, "Although highly inappropriate, even deliberate

deception of an attorney could not possibly affect a suspect's decision to waive his *Miranda* rights unless he were at least aware of the incident. * * *. Nor was the failure to inform respondent of the telephone call the kind of trickery that can vitiate the validity of a waiver." 106 S. Ct. 1135, 1142.

The Court further pointed out, "Nothing we say today disables the States from adopting different requirements for the conduct of its employees and officials as a matter of state law. We hold only that the Court of Appeals erred in construing the Fifth Amendment to the Federal Constitution to require the exclusion of respondent's three confessions." (106 S. Ct. 1135, 1145.) Thus, *Moran* does not overrule or disturb our supreme court's decision in *People v. Smith* (1982), 93 Ill. 2d 179, 442 N.E. 2d 1325.

Justice Stevens' dissenting opinion in *Moran*, joined by Justices Brennan and Marshall, pointed out that the majority opinion "completely rejects an entire body of law on the subject—the many carefully reasoned state decisions that have come to precisely the opposite conclusion." Justice Stevens thereupon cited 16 state court decisions,[2] including *Smith*, which held that a suspect's

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[2] *Elfadl v. Maryland* (1985), 61 Md. App. 132, 485 A. 2d 275; *Lodowski v. Maryland* (1985), 302 Md. 691, 490 A. 2d 1228, *petition for cert. filed*, 54 U.S.L.W. 3019 (U.S. June 21, 1985), (No. 85-23); *Dunn v. State* (Tex. 1985), 696 S.W. 2d 561, *cert. denied* (1986) —— U.S. ——, 89 L. Ed. 2d 732, 106 S. Ct. 1478; *Lewis v. State* (Okla. 1984), 695 P. 2d 528; *Commonwealth v. Sherman* (1983), 389 Mass. 287, 450 N.E. 2d 566; *Weber v. State* (Del. 1983), 457 A. 2d 674; *People v. Smith* (1982), 93 Ill. 2d 179, 442 N.E. 2d 1325; *State v. Matthews* (La. 1982), 408 So. 2d 1274; *State v. Haynes* (1979), 288 Or. 59, 602 P. 2d 272, *cert. denied*, (1980), 446 U.S. 945, 64 L. Ed. 2d 802, 100 S. Ct. 2175; *State v. Jones* (1978), 19 Wash. App. 850, 578 P. 2d 71; *Commonwealth v. Hilliard* (1977), 471 Pa. 318, 370 A. 2d 322; *State v. Jackson* (La. 1974), 303 So. 2d 734; *Commonwealth v. McKenna* (1969), 355 Mass. 313, 244 N.E. 2d 560; *Blanks v. State* (1985), 254 Ga. 420, 330 S.E. 2d 575; *State v. Beck* (Mo. 1985), 687 S.W. 2d 155; and *Haliburton v. Florida* (1985), 476 So. 2d 192.

statements given under circumstances similar to those in *Burbine* were obtained in violation of the suspect's constitutional privilege against self-incrimination and his attendant right of counsel and such statements therefore were inadmissible as evidence against him.

Finally, we note that the *Smith* decision cited *Miranda v. Arizona* (1966), 384 U.S. 436, 465-66, n. 35, 16 L. Ed. 2d 694, 86 S.Ct. 1602, as well as several decisions from other jurisdictions in which courts suppressed statements obtained from the defendant after the police had foiled an attorney's efforts to consult with his client. Those cited cases were: *State v. Matthews* (1982), 408 So. 2d 1274 (Louisiana), (because police refused to tell defendants their attorney was available and seeking to assist, subsequent interrogation was made without informed waiver or rights under the State constitution which incorporated the *Miranda* rights); *Commonwealth v. McKenna* (1969), 355 Mass. 313, 244 N.E. 2d 560, (suspect's waiver of right to counsel at an interrogation was ineffective where police denied counsel's request to see the defendant and failed to inform the defendant of the attorney's presence and request); *Commonwealth v. Hilliard* (1977), 471 Pa. 318, 370 A. 2d 322, (where the attorney was denied access to the suspect and the suspect was not told of the availability of the attorney, the suspect's failure to request counsel did not support a finding of waiver of counsel); and *State v. Jones* (1978), 19 Wash. App. 850, 578 P. 2d 61, (where the attorney requested that no interrogation be conducted in his absence and the police did not inform the defendant of the lawyer's availability and desire to be present, there was no knowing and intelligent waiver by defendant of his right to counsel.) 93 Ill. 2d 179, 188-89.

We reject the State's attempt in the case at bar to distinguish *Smith*. Although the defendant in *Smith* initially met with an attorney who agreed to represent him, the supreme court reasoned that the second attorney's thwarted efforts to talk to the defendant and the police officer's failure to tell the defendant that the second attorney had asked to see the defendant were reversible error and demanded a new trial.

In the pending case, defendant's attorney was not physically at the police station when he first made his request to talk to the defendant, but he testified at the pretrial hearing on the defendant's motion to suppress the defendant's statements that he asked to talk to the defendant when he spoke with Officer Meese on the telephone. Defendant's attorney told Meese that he was the defendant's attorney and that he had been asked by the defendant's wife to represent the defendant in this matter. As in *Smith*, this information was not communicated to the defendant.

We reject the State's reliance on *People v. Finklea* (1983), 119 Ill. App. 3d 448, 456 N.E. 2d 680. In *Finklea*, the court held that the defendant's statements were not elicited in violation of his fifth amendment right against self-incrimination when he was not informed during a police interrogation that an attorney retained to represent him was present and wished to see him because the defendant was not in custody during the interrogation. The court held that since the defendant was not in custody, *Miranda* did not apply. Such is not the case here.

With the preceding case analysis and authority as our guide, we are convinced that the State in this case failed to prove an effective waiver of counsel and that defendant's inculpatory statements should have been suppressed. Officer Meese acknowledged he had received a telephone call from defendant's attorney, Anthony Rocco, at about noon or 12:15. Rocco requested that he be notified of defendant's arrival at the station. Contrary to Meese's recollection, Rocco explained, "I then called the Des Plaines station and I spoke—approximately one o'clock,

I spoke to Investigator Meese, who—and I advised him that I was retained to represent Daniel Holland, and I requested to speak to him, himself. They told me that Holland had not come into the police station but that he was still in transit from Schiller Park."

In comparing his account with that of Officer Meese, Rocco stressed, "Now, I told Meese that I wanted him to call me, *that I did not want him to interrogate my client until I had a chance to see him and confer with him.* He said he understood it and that he would telephone me. * * *. I think, your Honor, it is reasonable to infer that I as an experienced criminal lawyer would not call an officer to have a lineup. I would know as a former Assistant State's Attorney who had taken many confessions myself, that they would attempt to interrogate him, and try to get him to admit to this crime, and that it would be obvious for me to tell them that I wanted to talk to him before they interrogated him."

Officer Meese's recollections on other points were shown to be mistaken. He testified defendant arrived at the Des Plaines station at about 2:30 or 2:45 but Assistant State's Attorney Raphaelson and Meese himself also testified to meeting with the defendant at 2 o'clock. Meese also stated that he spoke to defendant's attorney at about noon or 12:15, but defendant's wife testified she did not hire an attorney until 12:45 or 12:50. Thus, his failure to recall that defendant's attorney expressed the desire to see the defendant before the interrogation appears further error in recollection. The State has failed to show an adequate waiver of counsel by defendant at the custodial interrogation. It was error for the trial court to deny defendant's motion to suppress his statements. That ruling must be reversed.

Defendant's next contention for reversal is that his confession should not have been admitted because it was obtained by subterfuge and was therefore involuntary and inadmissible. We agree.

Assistant State's Attorneys Ira Raphaelson and Howie Friedman and Officer Meese were present during defendant's interrogation at the Des Plaines police station. Raphaelson testified at the hearing on defendant's motion to suppress his confession that the defendant gave "a false exculpatory statement" at that time and that after further conversation with the defendant, he and Friedman left the interview room. Meese remained in the room with the defendant. During this break in the interrogation, Meese continued talking to the defendant.

On cross-examination at the motion to suppress hearing, Meese testified:

> "Q And what did you say to Mr. Holland, and what did he say to you?
>
> A I continued questioning him relative to the crime. During my interview with the victim, she had indicated to me that while she was being forcibly raped in the alley, that a female had walked past the car. And I assumed that if Mr. Holland was involved, that he would have seen that same female. *At that time I indicated to him that we were notified by the City of Chicago that his vehicle was observed in the alley involved in a rape incident, and that he could not be identified, but that he would have to explain why the vehicle was there.* At that time he thought about that for approximately one to two minutes and voluntarily gave me a statement indicating—
>
> Q Was that a true statement he [you] made?
> A No, it was not.
> Q So you lied to him at that point?
> A I would not use the term, 'lie.'
> Q Pardon me?
> A *I would term it more subterfuge than lie.* (Emphasis added.)

Meese summoned Assistant Attorney Raphaelson back into the room and told Raphaelson that the defendant

would talk to him and now tell him what really happened. Defendant then gave a confession.

The State characterized Officer Meese's statement to the defendant as "basically true." The State argues that the only part of Meese's subterfuge that may have been misleading was that the city of Chicago had notified the Des Plaines police that an unidentified person saw the defendant's car in an alley when, in fact, the State points out, the complainant *had* seen the car in the alley and identified the defendant prior to the time that the defendant gave a confession.

We reject the State's effort to elevate Meese's misrepresentation to the defendant from what Meese himself characterized as a "subterfuge," to what the State refers to as a "basically true" statement. Whether a "subterfuge," misrepresentation, fabrication, falsehood or any other descriptive term to identify Meese's statement to the defendant, the statement was not true. The city of Chicago had *not* notified and had *not* told the Des Plaines police that defendant's car had been observed in the alley and that he could not be identified or that the defendant would have to explain why the car was there. In fact, by virtue of the defendant's fifth and fourteenth amendment privileges against self-incrimination, the defendant was not and could not have been required to explain why his car was anywhere at any time.

It is quite apparent that Meese made this statement to the defendant to frighten and induce him to confess. The "subterfuge" served its purpose. But a confession made under such circumstances is not freely and voluntarily given and is therefore inadmissible.

In determining whether a defendant's confession was voluntarily given, it must be ascertained whether the defendant's will was overborne at the time he confessed and whether the confession was made freely and without compulsion or inducement. As the Supreme Court unequivocally held in *Miranda v. Arizona* (1966), 384 U.S. 436, 476, 16 L. Ed. 2d 694, 86 S. Ct. 1602, "any evidence that the accused was threatened, tricked or cajoled into a waiver [of his fifth amendment privilege against self-incrimination] will, of course, show that the defendant did not voluntarily waive his privilege."

In *Lynumn v. Illinois* (1963), 372 U.S. 528, 9 L. Ed. 2d 922, 83 S. Ct. 917, the arresting officers misrepresented to the defendant, who had been arrested for the unlawful sale and possession of marijuana, that "if we took her into the station and charged her with the offense, that the ADC [Aid to Dependent Children] would probably be cut off and also that she would probably lose custody of her children." The confession as evidence vitiated the judgment of conviction because it violated the due process clause of the fourteenth amendment. The Court stated:

> "We think it clear that a confession made under such circumstances must be deemed not voluntary, but coerced. That is the teaching of our cases. We have said that the question in each case is whether the defendant's will was overborne at the time he confessed. [Citations.] If so, the confession cannot be deemed 'the product of a rational intellect and a free will.'" 372 U.S. 528, 534.

In *Lynumn*, the Supreme Court construed the officer's misrepresentation to the defendant as threats. In the case before us, Meese's misrepresentation to the defendant can likewise be so construed. Meese did not tell the defendant what would happen if the defendant failed to explain why his car was at the scene of the rape offense. Meese left that to the intimidated imagination of the defendant. Meese's misrepresentation was not only a "subterfuge," it was also a threat, as were the misrepresentations in *Lynumn*.

In *People v. Lee* (1984), 128 Ill. App. 3d 774, 471 N.E. 2d 567, the defendant was convicted of raping the

complainant in her apartment. The complainant testified that the defendant was her co-employee and a social acquaintance who had previously visited her home. When the defendant was initially taken into custody he denied being in the complainant's apartment on the night of the alleged rape. The assistant State's Attorney accurately told the defendant that he had been identified as the rapist but misrepresented to the defendant that his fingerprints had been found in the complainant's apartment. The defendant then admitted that he had been in the apartment on the night that the complainant said she had been raped.

The defendant in *Lee* stated that he and the complainant were co-workers and had an ongoing sexual relationship. He admitted that on the night in question, he and the complainant embraced, went into the bedroom and undressed, that they argued and that the defendant verbally abused and treated the complainant roughly. When the complainant mentioned the name of her former lover, the defendant left the apartment when the complainant ordered him to do so. The defendant denied the rape.

Citing *Miranda v. Arizona* (1966), 384 436, 16 L. Ed. 2d 694, 86 S. Ct. 1062; *People v. Stevens* (1957), 11 Ill. 2d 21, 141 N.E. 2d 33; and *People v. Gunn* (1973), 15 Ill. App. 3d 1050, 305 N.E. 2d 598, this court held in *Lee* that the assistant State's Attorney's misrepresentations to the defendant that his fingerprints had been found in the complainant's apartment rendered the defendant's confession involuntary and inadmissible, necessitating reversal of the rape conviction. 128 Ill. App. 3d 774, 780; see also *Spano v. New York* (1959), 360 U.S. 315, 3 L. Ed. 2d 1265, 79 S.Ct. 1202, where a misrepresentation to the defendant that his police friend's job would be jeopardized if the defendant did not confess was one of the factors on which the Supreme Court relied in holding that the defendant's confession was involuntary.

We hold that because Officer Meese made a knowing misrepresentation to the defendant, the defendant's confession was improperly obtained by subterfuge, was involuntary, not freely given and was inadmissible. The trial court erred in denying the defendant's motion to suppress his confession.

Defendant also urges that his conviction for armed robbery should be reversed because, he contends, the evidence failed to establish that he obtained the complainant's property with force, an element necessary for an armed robbery conviction. According to defendant, although he warned the victim that he would "knock her out," that threat had no bearing on his obtaining the victim's property. Instead, defendant maintains, the force he exerted was used in committing the sexual offenses and not to obtain the victim's property. We disagree.

Armed robbery is defined as the taking of property from the person or presence of another by the use of force or by threatening the imminent use of force while armed with a dangerous weapon. (Ill. Rev. Stat. 1981, ch. 38, par. 18-2; *People v. Ditto* (1981), 98 Ill.App. 3d 36, 424 N.E. 2d 3.) In an armed robbery offense, the requirement that the force be used to take property from another is satisfied if the fear of the victim was of such nature as in reason and common experience is likely to induce a person to part with his property. *People v. Dates* (1981), 100 Ill. App. 3d 365, 426 N.E. 2d 1033.

In the pending case, immediately before the defendant took the complainant's property, the defendant threatened the complainant with imminent force. Defendant stated to the complainant, while armed with a knife, that he was going to knock the complainant unconscious. The complainant was afraid and parted with her property because of these threats and her fear. The complainant's fear for her physical safety, which was reason-

ably based on the defendant's continuing threat of the imminent use of force to do bodily harm to her, was sufficient to induce her to part with her property—her driver's license, money and high school identification card.

Also, after the final sexual assault, defendant still brandished a knife. The evidence clearly established that the complainant was threatened by the defendant with the imminent use of force and that the defendant, while armed with a dangerous weapon, acquired the complainant's property.

Our disposition of this issue is persuaded by *People v. Pavic* (1982), 104 Ill. App. 3d 436, 432 N.E. 2d 1074. In *Pavic*, after illegally entering the victim's apartment and hiding in a bedroom closet, the defendant grabbed the victim's throat, choked her, and told her to stop screaming or he would stab her. The defendant also demanded money, which the victim said was in her purse. The defendant raped the victim twice. Thereafter, he went into the living room and took the victim's money and record albums.

The defendant argued that his conviction for robbery should be reversed because the force involved in the rape could not be imputed to the taking of the victim's property. The court's reasoning in *Pavic* is relevant to the determination we must make in the instant case. The court stated:

> "Here, it has been proved beyond a reasonable doubt that defendant exerted brutal force against G.S. when he grabbed her and chocked her and raped her. It cannot seriously be contended that the victim was not subdued by defendant's actions.
>
> • • • •
>
> [T]he present case involves evidence that defendant demanded money from G.S. at the beginning of the attack. The jury could well have inferred that

> he intended to rob her all along. After choking and raping her, moreover, defendant hardly had reason to anticipate any further resistance; his force against her remained in effect. Therefore, we hold that since defendant's use of force was not limited to the sexual assault and thus satisfies the robbery statute, defendant's robbery conviction must be affirmed." 104 Ill. App. 3d 436, 445-46.

In the case before us, defendant's reliance on *People v. King* (1979), 67 Ill. App. 3d 754, 384 N.E. 2d 1013, which affirmed the defendant's rape conviction but reduced the defendant's robbery conviction to theft, is misplaced. As the court pointed out in *King*:

> "[T]he evidence revealed that the rape occurred in the bedroom and that the purse was taken from the kitchen. The testimony established the distance between these two points was approximately 15 to 30 feet. *Nowhere in the record is there any indication that the purse was taken from the presence of the victim* with the use of force as required by the robbery statute." (Emphasis added.) 67 Ill. App. 3d 754, 759.

The defendant's reliance on *People v. Pack* (1976), 34 Ill. App. 3d 894, 341 N.E. 2d 4, which affirmed the defendant's attempted murder conviction but vacated his robbery conviction, is likewise misplaced. As the court in *Pack* stated:

> "Defendant looked through a window of the victim's house and saw her asleep. He then entered the house, choked her until he thought she was dead, took money from her purse, lying on a nearby chair, and fled. We believe that, although the facts adequately supported the attempt conviction, no factual basis was established to support the robbery charge. *Force was used against the victim with the intent to kill, not to steal. The subsequent taking of prop-*

erty, apparently an afterthought, established only theft * * *." (Emphasis added.) 34 Ill. App. 3d 894, 899.

In the case at bar, the force defendant used against the complainant in committing the sexual offenses and the complainant's fear occasioned thereby were in effect and present when the defendant took her property. The jury therefore had sufficient evidence to find beyond a reasonable doubt that the defendant committed the armed robbery offense.

Defendant's remaining issues are: (1) the extended term sentences for aggravated kidnapping was erroneous and should be "replaced" because it was not the most serious offense for which defendant was convicted; (2) the consecutive sentence for armed robbery was improper and should be vacated or made concurrent because the offense was part of a single course of conduct; and (3) the order that the sentences "shall be served consecutive to any parole violations" is too broad and indefinite to be valid.

The applicable section of the extended term statute provides:

> "A judge shall not sentence an offender to a term of imprisonment in excess of the maximum sentence authorized by Section 5-8-1 for the class of the most serious offense of which the offender was convicted unless the factors in aggravation set forth in paragraph (b) of Section 5-5-3.2 were found to be present." Ill. Rev. Stat. 1981, ch. 38, par. 1005-8-2(a).

Section 5-5-3.2(b) states:

> "[T]he following factors may be considered by the court as reasons to impose an extended term sentence under Section 5-8-2 upon any offender who was at least 17 years old on the date the crime was committed:

> (1) When a defendant is convicted of any felony, after having been previously convicted in Illinois of the same or greater class felony, within 10 years, excluding time spent in custody, and such charges are separately brought and tried and arise out of different series of acts; or
>
> (2) When a defendant is convicted of any felony and the court finds that the offense was accompanied by exceptionally brutal or heinous behavior indicative of wanton cruelty; or
>
> (3) When a defendant is convicted of any felony committed against:
>
> (i) a person under 12 years of age at the time of the offense;
>
> (ii) a person 60 years of age or older at the time of the offense; or
>
> (iii) a person physically handicapped at the time of the offense." Ill. Rev. Stat. 1981, ch. 38, para. 1005-5-3.2(b).

In the case before us, the trial court stated in sentencing the defendant:

> "[I]n imposing sentence, I've considered not only the evidence I have referred to and I've considered, but in particular that on this particular occasion, on May 4, 1980, the defendant, with a knife, kidnapped [the complainant] from the street. She sought his assistance with her friend because their automobile had broken down. He took them in his car and he held out a hand. They thought he was, in fact, an off-duty police officer. That's what he extended himself to be.
>
> * * * *

He [defendant] terrorized the complaining witness by threatening to kill her and members of her family if she should, in fact, go to the police.

And I, therefore, find that mental anguish and a strong possibility of impending death was upon the complaining witness throughout these entire proceedings; during the time she was with the defendant for one-and-a-half hours.

And therefore, this Court finds that the offenses of rape, deviate sexual assault and aggravated kidnapping were accompanied by exceptionally brutal and heinous behavior, indicative of wanton cruelty."

Thus, the trial judge held that the defendant's threat to kill the complainant and members of her family created "mental anguish and a strong possibility of impending death" and was exceptionally brutal and heinous behavior indicative of wanton cruelty. We do not decide whether a defendant's threat to kill a victim constitutes exceptionally brutal and heinous behavior indicative of wanton cruelty.

The defendant further contends that the trial court erred in sentencing him to a consecutive term of imprisonment for armed robbery. Ill. Rev. Stat. 1981, ch. 38, par. 1005-8-4(a) provides:

"When multiple sentences of imprisonment are imposed on a defendant at the same time * * * the sentences shall run concurrently or consecutively as determined by the court. The court shall not impose consecutive sentences for offenses which were committed as part of a single course of conduct during which there was no substantial change in the nature of the criminal objective, unless, one of the offenses for which defendant was convicted was a Class X or Class 1 felony and the defendant inflicted severe bodily injury, in which event the court may enter

sentences to run consecutively. Sentences shall run concurrently unless otherwise specified by the court."

The trial court expressly found:

"The armed robbery took place in the City of Chicago after the rapes had been completed. This was, in fact, a substantial change in the nature of the defendant's original objectives, and for that reason I made those express findings. *The armed robbery was not—again, was not a part of the defendant's original objective. His original objective was for sexual gratification and the armed robbery was not.* Therefore, the armed robbery was a distinctive objective and a distinctive offense." (Emphasis added.)

Other than as above noted, the trial court neglected to specify on what evidence it based its finding that "the defendant's original objective was for sexual gratification and the armed robbery was not," or that the initial purpose of the kidnapping was for sexual gratification.

Although the evidence clearly established that the sexual offenses were the initial offenses committed, the evidence did not establish that those sex offenses were the defendant's exclusive purpose of kidnapping the complainant.

Finally, the defendant contends that the order that "All of these sentences shall be served consecutive to any parole violations" is too indefinite and ambiguous and is therefore invalid. The defendant relies on what he characterizes as the "erroneous order" in *People v. George* (1979), 75 Ill. App. 3d 140, 393 N.E. 2d 1182, where the court imposed a sentence of 364 days "to run consecutive with any now pending sentence or any such further sentence received by virtue of a parole violation."

The State in *George* conceded that the sentence was improper under *People v. Walton* (1969), 118 Ill. App.

2d 324, 254 N.E. 2d 190, and agreed that the cause should be remanded for resentencing. The court in *Walton* stated:

> "Such language is so broad that it may be said to make this sentence consecutive to other sentences not in the present record. A sentence should be so complete as not to require construction by the court to ascertain its import, and so complete that it will not be necessary for a nonjudicial or ministerial officer to supplement the written words to ascertain its meaning." 75 Ill. App. 3d 140, 144, citing 118 Ill. App. 2d 324, 333.

Our supreme court held in *People v. Toomer* (1958), 14 Ill. 2d 385, 152 N.E. 2d 845, which was also cited in *George*, that:

> "[A] sentence of imprisonment to take effect in the future as cumulative punishment upon the termination of another sentence must be of such certainty that the commencement of the second and the termination of the first sentence may be ascertained from the record." 75 Ill. App. 3d 140, 144, citing 14 Ill. 2d 385, 387.

In the case before us, the State urges that the trial court's sentence is valid under *People v. Starnes* (1980), 88 Ill. App. 3d 1141, 411 N.E. 2d 125, where the trial court stated in imposing sentence:

> "Now, this is to be served consecutively to any prior convictions from this Court in 75-CF-231, and 76-CF-26. If your parole has run out you will just have to serve the three years with a day off for every day served for good behavior. If it has not run out then they will add that on."

The court in *Starnes* relied on *People v. Ferguson* (1951), 410 Ill. 87, 91, 101 N.E. 2d 522, *cert. denied*

(1952), 343 U.S. 910, 96 L. Ed. 2d 1327, 72 S. Ct. 643, which held that the validity of a judgment is not conditioned upon the choice of the most felicitous mode of expression.

Because we reverse the defendant's convictions and remand for a new trial, we do not decide the validity of the sentences imposed or whether defendant was denied effective assistance of counsel. The remaining issues raised by defendant do not merit discussion.

Reversed and remanded

Murray *, J., concurs.

Sullivan, P.J., dissents.

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* Justice Mejda heard the oral argument in this case and following his retirement, Justice Murray was substituted, listened to the tapes of the oral argument and read the briefs and record.

JUSTICE SULLIVAN DISSENTING:

The majority opinion reverses on conclusions that defendant's confession should have been suppressed (a) because he did not waive his right to counsel during the custodial interrogation when the confession was obtained and (b) because the confession was improperly obtained through a subterfuge by Officer Meese. I disagree with both conclusions.

The majority first concludes that there was no waiver of defendant's right to counsel "because the police did not tell him that his attorney was trying to reach him." In reaching this conclusion the majority opinion relies entirely on "testimony" of defense attorney Rocco that he told Officer Meese that he wanted to speak to defendant. However, Rocco gave no such testimony.

At the hearing on the motion to suppress, assistant State's Attorney Raphaelson, who was an assistant U.S. Attorney at the time of trial, testified that he did not talk to Attorney Rocco until 3 p.m. on May 4, which was after defendant's confession, and that prior thereto Raphaelson did not know that any attorney was trying or had attempted to reach defendant. Officer Meese testified that Attorney Rocco telephoned between noon and 12:15 p.m. on May 4 and requested only that he be notified when defendant was transferred to the DesPlaines Station for a lineup and that he (Meese) called Rocco between 2:30 and 2:45 p.m. that day to inform him of the lineup but Rocco was not at home. Meese also testified that he was not told by Rocco or anyone else that Rocco wanted to speak to defendant. At the hearing, Rocco testified that he came to the DesPlaines Station at 3:45 p.m. on May 4, which was after the confession and that he was permitted to see defendant at that time. Rocco gave no testimony, as stated in the majority opinion, that he told Meese or anybody else at any time before the confession was given that he wanted to speak to defendant. In fact, no one gave any testimony at the hearing contradicting that of Raphaelson and Meese as set forth above.

The record does show that in his interrogation of Meese during the hearing to suppress the confession Rocco asked whether he (Rocco) told him in the telephone conversation on May 4 that he wanted to speak to defendant but Rocco did not testify to any such statement. The majority considered this questioning and a comment made by Rocco in his argument as testimony by him in reaching the conclusion that there was no waiver of counsel by defendant because his counsel was not permitted to speak with him. The conclusion is unsupportable.

The conclusion is also improper under *Moran v. Burbine* (1986), —— U.S. ——, —— L.Ed.2d ——, 106 S.Ct. 1135, where the Supreme Court held that so long as defendant himself validly waived his right to counsel his statement to the police was admissible even though they would not allow an attorney hired by defendant's sister to contact him. After his initial arrest for breaking and entering, Burbine was informed of his *Miranda* rights but he refused to sign a waiver of counsel at that time. The police did not again question him for almost five hours, during which period others who had been arrested with Burbine implicated him in a murder. Within that five-hour interval a lawyer from the office of the public defender, in response to a call from defendant's sister, informed the police by telephone that he would act as Burbine's attorney if he were questioned or was included in a lineup. The police did not inform Burbine of the call and subsequently, after *Miranda* warnings, undertook three separate interrogations of him, after each of which he signed waivers of his rights and gave written statements which were used at the murder trial.

It was held in *Burbine* that the conduct of the police in thwarting the efforts of counsel to contact him did not undermine the validity of the otherwise proper waiver of his right to counsel. The court stated, in pertinent part, that such deception "could not possibly affect a suspect's decision to waive his *Miranda* rights unless he were at least aware of the incident." —— U.S. ——, ——, —— L.Ed.2d ——, ——, 106 S.Ct. 1135, 1142.

The majority here, while agreeing that under *Burbine* there would be a valid waiver in the instant case, relies instead upon *People v. Smith* (1982), 93 Ill.2d 179, 442 N.E.2d 1325, in finding that there was not a waiver. In *Smith*, following defendant's arrest he met with a private attorney who agreed to represent him and later the same day the attorney's associate went to the jail where defendant was detained but was denied access to him. The court held that there could be no knowing waiver of the right to counsel "if the suspect has not been informed that the attorney was present and seeking to consult with him." 93 Ill.2d 179, 189

I view *Smith* as being inapplicable because (a) at the time of his confession defendant here had not retained an attorney and did not know that his sister had contacted Rocco; (b) no attorney had presented himself or herself at any place where defendant was detained and (c) there is no testimony in the record that any attorney had ever sought to speak or consult with defendant prior to his confession. See *People v. Owens* (1984), 102 Ill.2d 88, 100, 464 N.E.2d 261 and *People v. Martin* (1984), 102 Ill.2d 412, 424, 466 N.E.2d 228 (*Smith* inapplicable where there was no indication in the record that any attorney attempted to confer with defendant prior to his confession).

I disagree also with the majority's other conclusion in reversing that the court erred in denying the motion to suppress defendant's confession because "Officer Meese

made a knowing misrepresentation to defendant, the defendant's confession which was improperly obtained by subterfuge, was involuntary, not freely given and was inadmissible." As stated in the majority opinion, Meese admitted at the hearing on the motion to suppress that he made an untrue statement to defendant that the police had been notified by the city of Chicago that his car had been seen in the alley where the crimes occurred and that, while he could not be identified, he would have to explain why his car was there. Solely on the basis of this statement by Meese the majority finds that defendant's confession was not freely and voluntarily given.

It is difficult to understand how the majority makes this finding since (a) defendant in his testimony made no mention of any statement by Meese that his car was seen in the alley where the crimes occurred; (b) defendant did not testify that any such statement by Meese or any other statement by anyone induced, coerced or influenced him in any manner to give his confession; (c) the confession was not given to Meese but to the two assistant State's Attorneys, Raphaelson and Freedman, and there is nothing in the record which even remotely suggests that either said or did anything to influence the confession and (d) defendant's counsel did not contend at any time in the trial court that Meese's statement coerced or influenced in any manner defendant's confession.

In fact, the record discloses that the only question asked of defendant at the hearing on the motion to suppress concerning the reason he gave the confession was by his attorney as follows: "Now did you confess once you were—because you were hurt?" and defendant answered "Yes I wanted people to leave me alone." Moreover, it is noted that the trial court found, in denying the motion to suppress the confession of defendant, that "his will was not overborne and he acted without any compulsion or any inducement of any sort whatsoever,

and he received his rights, and he acted freely and voluntarily and intelligently when he made the statements • • •."

Under these circumstances, where its conclusion is based solely upon the statement made by Meese to defendant and neither defendant nor his attorney stated or gave any indication in the trial court that the statement in any way influenced his confession, the finding of the majority that the confession was not freely or voluntarily given because of Meese's statement is unjustified.

For the reasons stated, I find that there is no support in the record here for the conclusions of the majority in reversing the convictions.

SUPREME COURT OF ILLINOIS

Docket No. 64182

THE PEOPLE OF THE STATE OF ILLINOIS,
Appellee,

vs.

DANIEL HOLLAND,
Appellant

Filed December 21, 1987

JUSTICE MORAN delivered the opinion of the court:

Defendant, Laniel Holland, was charged by indictment with two counts of aggravated kidnaping (Ill. Rev. Stat. 1979, ch. 38, para. 10—2(a)(3), (a)(5)); two counts of rape (Ill. Rev. Stat. 1979, ch. 38, par. 11—1); two counts of deviate sexual assault (Ill. Rev. Stat. 1979, ch. 38, par. 11—3); one count of armed robbery (Ill. Rev. Stat. 1979, ch. 38, par. 18—2); and one count of aggravated battery (Ill. Rev. Stat. 1979, ch. 38, par. 12—4(b)(1)). These charges stemmed from the sexual assault of a female suburban Cook County teenager. The indictment also charged the defendant with two counts of aggravated battery as a result of a confrontation with two police officers after his arrest (Ill. Rev. Stat. 1979, ch. 38, par. 12—4(b)(6)) and one count of unlawful use of weapons within five years of release from a penitentiary (Ill. Rev. Stat. 1979, ch. 38, para. 24—1(a)(9), (b)). On defendant's motion, the court severed the counts charging aggravated battery of a police officer and the count charging unlawful use of weapons. Trial

proceeded before a jury in the circuit court of Cook County on the remaining counts of the indictment.

Defendant was found not guilty of aggravated battery but was found guilty of aggravated kidnaping, rape, deviate sexual assault, and armed robbery. The court entered judgment on the verdicts and held a sentencing hearing to consider factors in aggravation and mitigation. At the conclusion of the hearing, the court found "that the offenses of rape, deviate sexual assault and aggravated kidnapping were 'accompanied by exceptionally brutal [or] heinous behavior indicative of wanton cruelty.'" (Ill. Rev. Stat. 1979, ch. 38, par. 1005—5—3.2(b)(2).) The court then sentenced the defendant to extended terms of 60 years' imprisonment for rape and deviate sexual assault (Ill. Rev. Stat. 1979, ch. 38, par. 1005—8—2(a)(2)) and an extended term of 30 years' imprisonment for aggravated kidnaping (Ill. Rev. Stat. 1979, ch. 38, par. 1005—8—2(a)(3)). These sentences were to run concurrently. As to the conviction for armed robbery, the court made a "separate and distinct" finding that the defendant's objectives changed during the course of the kidnapping from sexual gratification to armed robbery and that the sexual assault was completed before the armed robbery occurred. The court further found that this conviction was the defendant's fifth conviction for armed robbery and that society required protection from the defendant. On the basis of these findings, the court imposed a term of 25 years' imprisonment for armed robbery and ordered that it be served consecutively to the extended term sentences already imposed. (Ill. Rev. Stat. 1979, ch. 38, pars. 1005—8—4(a), (b).) The court further ordered that "[a]ll of these sentences shall be served consecutive to any parole violations."

Defendant appealed, raising numerous errors but principally contending that an inculpatory statement made during his post-arrest interrogation by an assistant

State's Attorney violated his *Miranda* rights (*Miranda v. Arizona* (1966), 384 U.S. 436, 16 L. Ed. 2d 694, 86 S. Ct. 1602) and should have been suppressed. A divided appellate court agreed, concluding that defendant's waiver of his *Miranda* rights was invalid because he was not informed, prior to receiving his rights and giving an inculpatory statement, that an attorney was attempting to see him. The majority of the court also held that defendant's statement was inadmissible because it was the product of a police "subterfuge." (147 Ill. App. 3d 323, 337-38.) We granted the State's petition for leave to appeal pursuant to Supreme Court Rule 604(a) (103 Ill. 2d R. 604(a)).

The central issue presented is the validity of defendant's waiver of his *Miranda* rights. We also consider the following issues raised by the defendant: (1) that the State used its peremptory challenges to exclude black jurors in violation of *Batson v. Kentucky* (1986), 476 U.S. 79, 90 L. Ed. 2d 69, 106 S. Ct. 1712; (2) that his trial counsel was ineffective; (3) that his conviction for armed robbery was improper because the State failed to prove that he took the complainant's property by force or threat of force; (4) that imposition of extended term sentence for aggravated kidnaping was improper; and (5) that imposition of consecutive sentences was improper. We first summarize the facts pertinent to these issues.

Testimony presented at the hearing on defendant's motion to suppress various post-arrest incriminating statements established that the defendant was the object of a traffic stop at approximately 8 a.m. on May 4, 1981, by a Schiller Park police officer because the vehicle he was driving did not have a rear license plate. The officer ordered a check of defendant's driver's license and found that it had been revoked. While awaiting the results of the driver's license check, the officer noticed that defendant's vehicle—a dark blue Chevrolet Camaro, his clothing—blue jeans, a jean jacket, a while T-shirt bearing

the word "Superscrew," and his physical appearance matched information contained in a reported abduction which occurred in Des Plaines, Illinois, at approximately 6 a.m. on May 4, 1980.

Defendant was arrested for improper vehicle registration, driving on a revoked license, and illegal transportation of alcohol. At the time of his arrest, a straight blade hunting knife was removed from his back pocket. Defendant was transported to the Schiller Park police station and, in a subsequent search, the complainant's high school identification card was found in a pocket of defendant's jacket. Also found in this search was $58.80 in currency and coins.

Schiller Park police then contacted Detective John Meese of the Des Plaines police regarding the arrest of the defendant. Detective Meese asked that the defendant be photographed and held pending further investigation. Detective Meese obtained the defendants' photograph from the Schiller Park police and presented it along with six others to the complainant. After she identified the defendant's picture as representing her assailant, Meese made arrangements to transport the defendant to the Des Plaines station. Prior to moving the defendant, Meese spoke by telephone to Anthony Rocco, who represented himself as defendant's attorney. According to Meese, Rocco asked to be notified if the defendant was to be placed in a lineup. Meese testified that he telephoned Rocco later that afternoon and left a message that the defendant would be in a lineup.

Meese transported the defendant to the Des Plaines station. Upon arriving, Meese advised him of his *Miranda* rights and was present during an interview conducted by Assistant State's Attorney Ira Raphaelson, accompanied by Assistant State's Attorney Howard Freedman. The interview began at approximately 2:05 p.m. on the afternoon of May 4.

Meese heard Raphaelson give the defendant his *Miranda* rights. About 20 minutes later, Raphaelson left the interview room, leaving the defendant and Detective Meese alone together. At this time, Meese told the defendant:

> "that we had received a report from the City of Chicago in reference to a female being raped in an alley. At that time his license plate was given as to the offending vehicle, and his vehicle was described as the same type vehicle.
>
> At that time I told him that the woman could not make a positive identification of him; however, he would have to explain why his vehicle was at that particular location."

Meese also testified that, in fact, he had not received such a report. However, Meese stated that the defendant responded by saying "he now wished to tell the truth."

Meese summoned Raphaelson and remained in the room during this second interview. He testified that he again heard Raphaelson advise defendant of his *Miranda* rights. During this interview, the defendant gave an oral inculpatory statement in which he admitted that he had picked up the complainant and her companion on Irving Park Road in Des Plaines; that he forced the companion from his car; that he forced the complainant to accompany him; that he forced her to perform two acts of fellatio and also raped her on two separate occasions. In addition, he admitted taking the complainant's money and her high school identification.

Meese stated that the defendant did not complain of any injuries when he arrived at the Des Plaines police station. He stated that he observed no physical or mental coercion of the defendant during the two interviews conducted by Raphaelson. Meese also indicated that the defendant acknowledged that he understood his *Miranda* rights and at no time requested an attorney.

Assistant State's Attorney Ira Raphaelson testified at the suppression hearing that he interviewed the defendant twice on May 4—once at approximately 2:05 p.m. and a second time at approximately 2:30 p.m. Raphaelson stated that he began the first interview by introducing himself and telling the defendant that he represented the State and not the defendant. He then advised the defendant of his *Miranda* rights. According to Raphaelson, defendant indicated that he understood his rights and agreed to talk. Defendant proceeded to give a false exculpatory statement in which he said that he had picked up a teenage girl and her boyfriend who were hitchhiking and that an argument ensued whereupon he ordered the two out of his car. The defendant explained his possession of the complainant's school identification card by saying that she had dropped it on the floor of his car, where he found it and placed it in the pocket of his jacket.

Raphaelson stated that he left the interview room. The defendant and Detective Meese remained inside with the door slightly open. Raphaelson stood about 10 feet from the door. He could not see the defendant, but he could see Meese, who was talking, presumably to the defendant. At approximately 2:30 p.m., Meese called him back into the interview room. Raphaelson reentered and again advised the defendant of his *Miranda* rights. Defendant again indicated that he understood his rights. He proceeded to give his oral incriminating statement.

Raphaelson testified that he then left the room and spoke to defendant's attorney, Anthony Rocco. According to Raphaelson, Rocco wanted to know what charges would be filed but did not ask to be present during any interviews or interrogations. Raphaelson also stated that, while he was aware that defendant's attorney had called the Des Plaines station, he was unaware of any request to speak with the defendant prior to any interviews. At

approximately 4 p.m. on May 4, Raphaelson informed Rocco of the charges against the defendant.

Defendant's wife, Patricia Holland, also testified at the suppression hearing. She stated that a Schiller Park officer notified her around 8:30 a.m. on the morning of May 4, 1980, that her husband had been arrested for several traffic violations and that she should come to the station to post bond. Later that morning, she was informed that her husband was being held for the Des Plaines police, who were preparing other charges against him. Mrs. Holland was not told what charges were contemplated.

Mrs. Holland then contacted Anthony Rocco and requested that he represent her husband. She reached Rocco around 1 p.m. on May 4. During that afternoon, she spoke to him on several occasions. During each conversation, Rocco related his unsuccessful efforts to see the defendant. Mrs. Holland further testified that she met attorney Rocco at the Des Plaines station around 3:45 p.m. Shortly thereafter, Rocco was permitted to meet with the defendant.

The defendant testified at the suppression hearing, stating that he spoke to his wife by telephone around 8:30 a.m. on May 4, 1980. He was in the custody of the Schiller Park police. He stated that he told his wife to contact attorney Rocco so that he could arrange for the defendant's release.

Defendant further testified that, while in the custody of the Schiller Park police, an officer pulled his hair. As he resisted, defendant stated, his hands were handcuffed behind him and his "arms were elevated to where [he] couldn't stand on [his] feet. [He] was knocked to the ground, kicked, hit." The defendant also stated that he was punched with a 40-inch night stick "where I would be covered with clothing." As a result, defendant stated that he lost tufts of hair, that his ribs hurt, and that his

right knee became swollen. He testified that he was hit repeatedly under his chin with a billy club while his "mug shot" was taken. When he resisted, he was knocked to the floor and beaten again. Defendent received no medical treatment while at the Schiller Park station.

Defendant further testified that he was mistreated by Detective Meese of the Des Plaines police after he arrived at the Des Plaines station. According to the defendant, between the first and second interview with Assistant State's Attorney Raphaelson, he was left alone with Meese. During this time, Meese jabbed him in the ribs for about 5 to 10 minutes. Meese then said that the defendant "better start answering questions or he was going to kick my ass." Shortly thereafter, Raphaelson returned. However, defendant did not tell Raphaelson about Meese's physical mistreatment or about his verbal threat. According to the defendant, he then told them "what [he] believed [they] wanted to hear." There followed an incriminating statement in which defendant admitted that he had picked up the complainant and her boyfriend; that he forced the boyfriend out of the car; that he forced the complainant to perform two acts of fellatio; that he raped her. Defendant stated that, throughout this entire period, no one advised him of his *Miranda* rights.

Defendant also testified that, after his arrival at the Des Plaines station, he repeatedly asked for an attorney. Ultimately, he did see his attorney, Anthony Rocco, but not until he had given his inculpatory statement and had been placed in a lineup. When he did see his attorney, defendant told him of the physical mistreatment he had received. On May 5, defendant stated that he was taken to Cermak Hospital, where he was told that he probably had fractured ribs in the mid-chest area. Defendant was given medication for pain and told to take sitz baths for his knee.

Anthony Rocco, defendant's attorney, also testified at the suppression hearing. He testified that he first saw the defendant at 4 p.m. on May 4 and that he was limping. Rocco stated that the defendant said that he had been beaten and showed Rocco his right knee. According to Rocco, the knee was discolored. Rocco also stated that the defendant said that he had been mistreated by the Schiller Park police and by Detective Meese of the Des Plaines police.

Attorney Rocco did not testify regarding his various attempts to reach the defendant and talk to him prior to any questioning. However, during his closing argument on the motion to suppress, Rocco stated that he talked to Detective Meese by telephone around 1 p.m. on May 4 and specifically requested to talk to the defendant prior to any questioning. Rocco also argued that, sometime between 1 and 3 p.m., he made this same request of Assistant State's Attorney Raphaelson. Rocco concluded his argument by noting that he was not permitted to see the defendant until after he had given an incriminating statement and had been placed in a lineup.

At the close of testimony on defendant's motion to suppress, the court concluded "that [the] degree of physical confrontation contaminate[d] any statements defendant would have made at the Schiller Park Police Station, and accordingly any statements made relevant to this cause made by the defendant in the Schiller Park Police Station * * * are hereby suppressed, and suppressed in toto." The court also found that the defendant was given his *Miranda* rights by Assistant State's Attorney Raphaelson and further found that "no physical cruelty was proved to be exerted by the police department in Des Plaines." The court concluded that defendant's "will was not overborne, and he acted without any compulsion or inducement of any sort whatsoever, and he received his rights, and he acted freely and voluntarily and intelligently when he made the statements of 2:05 and 2:30."

The case against the defendant proceeded to trial. During opening arguments, the State made no mention of defendant's incriminating statement in reviewing what it expected to prove and by what evidence. However, defense counsel Rocco did refer to defendant's inculpatory statement during his opening argument.

The State's principal witness was the complainant. She testified that she and her boyfriend left a party they were attending around midnight on May 4, 1980. A short while later, they discovered that their car had a flat tire. After pulling off onto the shoulder of Irving Park Road in Des Plaines, they found that the spare tire was flat as well. They turned on the car's emergency flashing lights, but no one stopped to give assistance. After about an hour, they decided to sleep in the car and go for help in the morning. They turned off the flashing lights, turned on the parking lights, and went to sleep.

The two awoke at dawn, approximately 6 a.m., on May 4 and began walking down Irving Park Road. Almost immediately, the defendant drove up in a blue Chevrolet Camaro and offered to give them a ride. They accepted and got into defendant's car. The complainant sat in the front passenger seat while her companion sat in the back seat. After driving around awhile, the defendant grabbed the complainant around her shoulder, placed a knife to her throat, and ordered her companion out of the car. When he refused to exit, the defendant said that he would kill the complainant unless he complied. He acquiesced and the defendant drove off with the complainant.

The complainant continued, testifying that the defendant held the knife under her arm while he drove. Defendant proceeded to the parking lot of an apartment complex where he ordered her to disrobe. After undressing, she testified that the defendant pushed her head into his groin area, where his penis entered her mouth. Defendant then stated, "you're not getting it hard," whereupon he cut her on the right leg from the upper thigh to the hip.

She stated that the defendant began driving again while his penis remained in her mouth. The defendant drove to an alley on Diversey in Chicago and parked. She said that a woman saw them drive into the alley. The defendant stopped the car and forced her to straddle him and the defendant's penis entered her vagina. Defendant then ordered her out of the car and forced her to perform a second act of fellatio. Next, he told her to turn around and face the car, at which time she again felt his penis enter her vagina.

Defendant returned her clothes and told her to get dressed. He then told her to close her eyes and, when she asked why, he said, "it'll be easier that way. I'm going to knock you out." The complainant testified that she told him he could have anything he wanted, giving him her high school identification card while the defendant took her money, approximately $60. She concluded her testimony by stating that she began walking towards a grocery store and that she observed the defendant drive away in a vehicle that did not have a rear license plate.

The testimony of the victim's boyfriend corroborated the complainant's testimony about the events leading up to the abduction. He testified further that he was shown a picture of the defendant along with several other pictures and identified that of the defendant as representing the man who offered him and the complainant a ride on the morning of May 4, threatened him, and drove off with her. During his testimony, he also made an in-court identification of the defendant.

Medical testimony was presented confirming that the complainant had been cut on the right leg. There was also medical testimony confirming the presence of semen

and spermatozoa in the vaginal swab taken from the complainant approximately an hour and a half after her release.

The State rested its case in chief. The defense elected not to present a case. Defense counsel, however, cross-examined all of the State's witnesses at length, establishing, among other things, that the semen and spermatozoa found in the vaginal swab could not be linked directly to the defendant nor could its age be determined; that no semen was found in the crotch of the bib overalls worn by the complainant; that no semen was found on defendant's underwear or on the jeans worn by the defendant; that the complainant's fingerprints were not found either in or on the defendant's automobile. During closing argument, defense counsel reviewed the State's case in detail. He concluded by saying, "Think of all the factors I've pointed out to you. I must have pointed out to you 20, 30 reasonable doubts in my opinion. Consider those." Defense counsel also reminded the jury that the defendant had been subject to physical force by police.

The first issue on appeal is the validity of the defendant's waiver of his privilege against self-incrimination after receiving his *Miranda* rights while in custody at the Des Plaines police station.

The State contends that the appellate court erred in holding defendant's waiver invalid because it was given without knowledge that an attorney was attempting to confer with him. In support of its position, the State argues that this case is controlled by *Moran v. Burbine* (1986), 475 U.S. ——, 89 L. Ed. 2d 410, 106 S. Ct. 1135. In *Burbine*, a custodial suspect confessed after receiving and waiving his *Miranda* rights. He did so without knowledge that his sister had retained an attorney to represent him and that an associate of the attorney had been in telephone contact with the police specifically indicating that "she would act as Burbine's legal counsel in the event that the police intended to place him in a lineup or question him." While the associate was told that Burbine would not be questioned until the following day, police in fact interrogated him later that evening, securing three written statements which Burbine was unsuccessful in suppressing.

The Supreme Court concluded that a suspect's knowing and intelligent waiver of his *Miranda* rights does not require knowledge that an attorney has been retained or information that the attorney has been in contact with the police or has attempted to see the suspect. The Court held that "[o]nce it is determined that a suspect's decision not to rely on his rights was uncoerced, that he at all times knew he could stand mute and request a lawyer, and that he was aware of the state's intention to use his statements to secure a conviction, the analysis is complete and the waiver is valid as a matter of law." (*Moran v. Burbine* (1986), 475 U.S. ——, ——, 89 L. Ed. 2d 410, 422, 106 S. Ct. 1135, 1142.) Since the *Burbine* standard was met in this case, the State urges that we apply it and hold that defendant's waiver was valid.

The defendant argues that the appellate court was correct in rejecting *Burbine* and following instead this court's decision in *People v. Smith* (1982), 93 Ill. 2d 179. Initially, defendant notes that the *Burbine* Court expressly invited the States to adopt more stringent standards for evaluating a suspect's waiver of his *Miranda* rights under applicable State constitutional provisions when it stated that "[n]othing we say today disables the States from adopting different requirements for the conduct of its employees and officials as a matter of state law." (*Moran v. Burbine* (1986), 475 U.S. ——, ——, 89 L. Ed. 2d 410, 425, 106 S. Ct. 1135, 1145.) The defendant urges that we accept this invitation and apply *Smith* to find that his privilege against self-incrimination guaranteed by article 1, section 10, of the Illinois Consti-

tution of 1970 (Ill. Const. 1970, art. I, sec. 10) was violated when the Des Plaines police and the assistant State's Attorney failed to inform him that an attorney had been contacted and was attempting to see him.

We decline defendant's invitation. In our view, *Smith* and *Burbine* are clearly distinguishable cases with *Burbine* being virtually on all fours with the instant case. Here, as in *Burbine*, a relative secured counsel for the suspect; the suspect was unaware that counsel had been retained; all communication between the police or prosecutors and the attorney was by telephone. *Smith* differs significantly from *Burbine* and the instant case. In *Smith*, the suspect actually met with an attorney after his arrest and personally retained him as counsel. Further, a partner of the retained counsel personally went to the jail where defendant was being held and asked to meet with him. She did not limit her communications to telephone conversations with the authorities or ask to be notified in the event authorities anticipated questioning her client or placing him in a lineup. Applying *Burbine*, we hold that the defendant was given his *Miranda* rights at the Des Plaines police station, that he understood the nature of those rights, and that his *Miranda* waiver was valid despite the fact that he was not told that an attorney wanted to confer with him prior to any interrogation or lineup.

The appellate court also held that defendant's *Miranda* waiver was invalid because it was secured by Detective Meese's "subterfuge." Meese told the defendant that he had received a report from the Chicago police department that his vehicle was seen in the same alley where the complainant was raped and that he would have to explain why his vehicle was there. However, no such report existed.

The State argues that this "subterfuge" does not invalidate the defendant's *Miranda* waiver. The State

maintains that neither the Supreme Court nor this court has held that a lie, misrepresentation, or half-truth is sufficient to invalidate a *Miranda* waiver. *Frazier v. Cupp* (1969), 394 U.S. 731, 739, 22 L. Ed. 2d 684, 693, 89 S. Ct. 1420, 1425 (a false statement by police that his co-defendant had confessed "is, while relevant, insufficient in our view to make this otherwise voluntary confession inadmissible"); *People v. Kashney* (1986), 111 Ill. 2d 454, 465-67 (a false statement by an assistant State's Attorney that defendant's fingerprints were found at the scene of an alleged rape is insufficient to invalidate a *Miranda* waiver); *People v. Martin* (1984), 102 Ill. 2d 412, 426-27 (same).

The defendant responds by arguing that, while a misrepresentation standing alone may not invalidate a *Miranda* waiver, a mispresentation which is coercive in effect will invalidate the waiver. Defendant relies on *Lynumn v. Illinois* (1963), 372 U.S. 528, 530-35, 9 L. Ed. 2d 922, 924-27, 83 S. Ct. 917, 918-21, and *Spano v. New York* (1959), 360 U.S. 315, 319, 322-23, 3 L. Ed. 2d 1265, 1269, 1271-72, 79 S. Ct. 1202, 1205, 1206-07. In *Lynumn*, the Supreme Court invalidated a confession given after police told the defendant that, if she did not cooperate, her children would be taken away and she would lose her public aid. The Court held that these statements amounted to threats and that Lynumn's confession was coerced. In *Spano*, the defendant, upon his arrest, telephoned a close friend who, at the time, was enrolled in a police academy. On four separate occasions, the friend's police superiors ordered him to play on the defendant's sympathy by telling the defendant "that [his] telephone call had gotten him into trouble, that his job was in jeopardy, and that loss of his job would be disastrous to his three children, his wife, and his unborn child." In fact, the friend's job was in no way placed in jeopardy by the defendant's call. On the totality of the circumstances, the Court held that the defendant's will

was overborne, which rendered his confession involuntary. However, use of the defendant's friend and the friend's false statement that his job was endangered was only one of a number of factors which rendered the confession involuntary. Spano was foreign born, emotionally unstable, with no criminal history, and was subject to questioning for eight continuous hours.

Lynumn and *Spano* are clearly distinguishable from the case at bar and, in our view, do not control. Unlike *Lynumn*, Detective Meese's so-called "subterfuge" was not employed to suggest that the defendant would suffer physical, emotional, or material harm if he did not explain the presence of his automobile in the alley where the complainant was raped. Here, unlike Spano, there is no indication that the defendant lacked the capacity to understand his rights. He was questioned only briefly. Finally, Meese's statement did not threaten or imply that either the defendant or a loved one would be harmed in some way if the defendant asserted his right to remain silent rather than explain the presence of his automobile in the alley.

We also find unconvincing defendant's contentions that Meese's statement was false or misleading. It is true that Meese had not received a Chicago police report placing defendant's vehicle in the alley. However, the complainant testified that a woman saw the defendant drive into the alley where he then raped her, and the record indicates that Meese spoke to the complainant before interviewing the defendant. We hold, therefore, that defendant's waiver of his *Miranda* rights was unaffected by Meese's statement and is valid.

Defendant, however, advances a third argument in support of his contention that his *Miranda* waiver was invalid. He argues that his physical mistreatment by Schiller Park police should be imputed to the Des Plaines police and the assistant State's Attorney. Under his theory, physical coercion by one governmental entity renders involuntary any statements made to another governmental entity even though no physical force is used by the second entity. In support of this argument, defendant relies on *People v. Thomlison* (1948), 400 Ill. 555, 562-64, and *People v. Santucci* (1940), 374 Ill. 395, 398-401. In *Thomlison*, the defendant confessed to Alton, Illinois, police the day after being "brutally assaulted" by members of the same police force. In *Santucci*, the defendant confessed to Chicago police three days after being "severely beaten" by members of the Chicago police force in an unrelated incident. In both cases, this court held that the confessions were involuntary because the physical coercion of the first encounter carried over to and tainted the encounter which produced the confessions. Since the circuit court, in the instant case, suppressed defendant's statements made to the Schiller Park police because it found that there had been some type of "physical confrontation" while the defendant was in their custody, defendant concludes, on the authority of *Thomlison* and *Santucci*, that the "physical confrontation" tainted the interrogation by the Des Plaines police and the assistant State's Attorney which resulted in his oral incriminating statement. We do not agree.

Our review of the record indicates that there was no affirmative showing that the defendant was beaten by Schiller Park police. The defendant, testifying during the suppression hearing, claimed that he was beaten. However, two counts of the indictment against the defendant were for aggravated battery of two Schiller Park officers. At the conclusion of the suppression hearing, the court did not find that the defendant had been beaten but, rather, that there had been some sort of "physical confrontation." The court gave the defendant the benefit of any doubt and suppressed all statements made while in the custody of the Schiller Park police. However, in the absence of an affirmative finding of physical coercion by the Schiller Park police, there can be no coercion avail-

able to infect either the interrogation of Detective Meese of the Des Plaines police or the interrogation of Assistant State's Attorney Raphaelson.

The "physical confrontation" between the defendant and the Schiller Park police had no bearing on the events which transpired between the defendant and the Des Plaines police or the assistant State's Attorney. Accordingly, we conclude that the statements made by the defendant to the assistant State's Attorney while in the custody of the Des Plaines police was not coerced.

Defendant presses two other arguments in support of the appellate court's decision reversing his conviction. First, he contends that the State used its peremptory challenges to excuse two black prospective jurors solely on the basis of their race in violation of *Batson v. Kentucky* (1986), 476 U.S. 79, 90 L. Ed. 2d 69, 106 S. Ct. 1712.

We decline to address this issue because we find that the defendant, a Caucasian, does not have standing to assert a *Batson* violation. Under *Batson*, the defendant challenging the exclusion of prospective jurors because of their race must show "that members of *his race* have been impermissibly excluded" (Emphasis added.) (476 U.S. 79, ——, 90 L. Ed. 2d 69, 85-86, 106 S. Ct. 1712, 1721.) Since defendant is white and the excluded prospective jurors are black, he is unable to show that members of his race have been excluded impermissibly. Thus, he is unable to establish the threshold element of a *prima facie Batson* violation.

Defendant argues, in the alternative, that the exclusion of the only two black prospective jurors in the jury array violated his sixth amendment right to trial by a jury representing a fair cross-section of the community. Neither this court (*People v. Gaines* (1984), 105 Ill. 2d 79, 88; *People v. Williams* (1983), 97 Ill. 2d 252, 278-80) nor the Supreme Court (*Batson v. Kentucky* (1986), 476

U.S. 79, —— n.4, 90 L. Ed. 2d 69, 79 n.4, 106 S. Ct. 1712, 1716 n.4) have so held. We decline to overrule this court's prior holdings by finding that the peremptory exclusion of blacks or other minorities violates the fair cross-section requirement.

Defendant next argues that he received ineffective assistance of counsel at trial and urges this ground as an alternative basis for affirming the reversal of his conviction. According to the defendant, the State had decided not to use his inculpatory statement as part of its case in chief. However, the State reversed its position and placed the statement into evidence after defense counsel specifically mentioned the defendant's statement in opening argument before the jury. The defendant claims that this is an example of his counsel's ineffectiveness. The defendant also claims that cross-examination by counsel was often "irrelevant," "suggestive," "misleading," and "improper," forcing the trial court into frequent off-the-record admonitions. Defendant maintains that this conduct is indicative of incompetence.

To prevail on a claim that trial counsel was ineffective a defendant must show that counsel's performance fell "outside the wide range of professionally competent assistance" and "but for counsel's [incompetence], the result of the proceeding would have been different." *Strickland v. Washington* (1984), 466 U.S. 668, 690, 694, 80 L. Ed. 2d 674, 690, 698, 104 S. Ct. 2052, 2066, 2068; *People v. Collins* (1985), 106 Ill. 2d 237, 273-74; *People v. Albanese* (1984), 104 Ill. 2d 504, 525-27.

Our reading of the record leads to the conclusion that the defendant has failed to sustain his burden on either prong of the *Strickland* test. As to the competence of defendant's trial counsel, we note that he succeeded in severing three counts of the indictment against the defendant. Trial counsel also succeeded in suppressing defendant's statements made to the Schiller Park police

and was vigorous, if unsuccessful, in his efforts to suppress the incriminating statement given to the assistant State's Attorney at the Des Plaines station. Counsel's defense was effective enough to win a verdict of not guilty on the charge of aggravated battery of the victim.

Counsel was effective in creating a record which provided several grounds on which to challenge on appeal the validity of defendant's *Miranda* waiver. During selection of the jury, counsel challenged the State's use of its peremptory challenges to exclude black prospective jurors.

The record also reveals that counsel was vigorous in his cross-examination of witnesses with the apparent purpose of raising reasonable doubt in the minds of the jurors. For example, counsel brought out the fact that the complainant's fingerprints were not found either in or on the defendant's automobile. He also established that there was no semen found on defendant's underwear or other clothing and that the semen found on the complainant's clothing and in her vaginal swab could not be linked positively to the defendant. Finally, in closing argument, counsel stressed the inconsistencies he had developed during cross-examination, arguing that each one raised a reasonable doubt and that each one would support a verdict of not guilty on all counts.

The record establishes that counsel was active in his defense both in pretrial proceedings and during trial. On the totality of this record, the fact that he was first to raise defendant's inculpatory statement pales into insignificance. Further, even if we were to conclude that the reference to defendant's inculpatory statement was incompetent, it would remain incumbent upon the defendant to show that, but for that error, he would have been found not guilty. In view of the accurate and unwavering in-court and out-of-court identifications of the defendant by the complainant and her companion, we believe that

there was ample evidence adduced to find the defendant guilty beyond a reasonable doubt. Therefore, even if it was error to raise the existence of defendant's incriminating statement, it cannot be deemed prejudicial on this record. We conclude that the defendant has not established that he received ineffective assistance of counsel.

Defendant also challenges his conviction for armed robbery affirmed by the appellate court. He contends that the State failed to prove that he took the complainant's school identification and money by force or threat of force, an essential element of the offense of armed robbery. After a thorough review of the record on this issue, we find ample support for defendant's armed robbery conviction.

The complainant testified that, after the final sexual assault, the defendant returned her clothing and told her to get dressed. After she did so, the defendant told her to close her eyes and, when she asked why, replied, "it'll be easier that way. I'm going to knock you out." To avoid further physical attack, she offered the defendant "anything he wanted." She then handed over her identification and the defendant took her money. Throughout this exchnge, the defendant remained armed with the hunting knife he had displayed during the entire course of his sexual attacks on the complainant.

It is clear from the complainant's uncontradicted and unimpeached testimony that she parted with her property in order to avoid being a victim of yet another act of violence. Under these circumstances, the State proved beyond a reasonable doubt that the property of another was taken by force or threat of force. (*People v. Tiller* (1982), 94 Ill. 2d 303, 316.) We, therefore, affirm defendant's conviction for armed robbery.

Defendant's final two issues concern sentencing. He first contends that the circuit court erred in imposing an extended term sentence on the conviction of aggravated

kidnaping because it is not an offense of "the class of the most serious offense of which the offender was convicted." (Ill. Rev. Stat. 1979, ch. 38, par. 1005—8—2(a).) He contends that aggravated kidnaping is a Class 1 felony while rape and deviate sexual assault are Class X felonies. He concludes that, under the extended term sentencing provision, only the convictions for rape and deviate sexual assault can provide the basis for extended term sentences.

The State concedes that the extended term sentence for aggravated kidnaping was improper. Therefore, on the authority of *People v. Jordan* (1984), 103 Ill. 2d 192, 204-07, and *People v. Evans* (1981), 87 Ill. 2d 77, 87, we vacate defendant's sentence for aggravated kidnaping.

Defendant's final challenge is directed at the imposition of a consecutive sentence on the armed robbery conviction as well as the court's order that all sentences for the instant convictions were to be served consecutively to "any parole violations." We first consider the propriety of a consecutive sentence for the armed robbery conviction.

Section 5—8—4 of the Unified Code of Corrections (Ill. Rev. Stat. 1979, ch. 38, pars. 1005—8—4(a), (b)) provides that a consecutive sentence may be imposed where the court finds: (1) that the offense receiving the consecutive sentence was substantially different from the other offenses for which the defendant was sentenced, and (2) that imposition of a consecutive sentence is necessary to "protect the public from further criminal conduct by the defendant."

The record reveals that the circuit court expressly found that the defendant's objective changed during the course of the kidnaping. The court also found that the initial motivation for the kidnaping was sexual gratification and further found that the sexual assault was completed at the time the defendant robbed the victim. The

court then referred to the defendant's prior convictions for four armed robberies and concluded that society required protection from the defendant's future criminality. The court then ordered that the sentence for armed robbery be served consecutively to the concurrent sentences imposed for rape, deviate sexual assault, and aggravated kidnaping.

A consecutive sentence imposed pursuant to applicable law and supported by the record will not be disturbed on review. (*People v. Steppan* (1985), 105 Ill. 2d 310, 323.) We believe that the court had ample grounds to impose a consecutive sentence for the armed robbery conviction.

It is manifest beyond peradventure that, at the time of the armed robbery, the sexual assault of the complainant had terminated and that the defendant was preparing to release her. The complainant testified that the defendant had returned her clothes and that she was dressed when the defendant threatened to "knock her out," subsequently taking her identification and money. After taking possession of this property, the defendant allowed her to leave and, while leaving, she saw him drive away.

It is also clear that society requires protection from the defendant. He committed a traumatic series of sexual assaults over the course of two hours upon a teenage girl, threatened to kill her throughout the ordeal, and threatened to kill her if she reported the incident to the police. These events occurred while the defendant was on parole on four convictions for armed robbery, the same offense committed here. Thus, there is more than adequate support for the court's order that the sentence for armed robbery be served consecutively, and we affirm this order.

Defendant's second sentencing challenge is to the court's order that all sentences imposed in the instant

case were to be served consecutively to "any parole violations." He contends that a sentence consecutive to "any parole violations" is insufficiently specific and that remand for resentencing is required.

The State argues that the court meant to order that the sentences in the instant case were to be served consecutively to defendant's reconfinement for violation of parole on his prior armed robbery convictions. According to the State, the record shows the case numbers of the prior convictions in addition to a presentence report containing a notation of these convictions along with a narrative indication that a warrant for parole violation had issued, with the Prison Review Board preparing to take action at a later date.

This court has affirmed imposition of sentences consecutive to an unrelated prior sentence where the completion of the prior sentence and the beginning of the later sentence can be ascertained from the record. (*People v. Toomer* (1958), 14 Ill. 2d 385, 387.) We agree with the State that the necessary certainty can be derived from this record and, therefore, affirm the order that the sentences in the instant case are to be served consecutively to any remaining portion of the defendant's sentence for the four prior armed robbery convictions.

For the reasons stated herein, we reverse the judgment of the appellate court. We affirm defendant's convictions and all sentences with the exception of the extended term sentence for aggravated kidnaping, which is vacated. The cause is remanded to the circuit court of Cook County for resentencing on the aggravated kidnaping conviction.

Appellate court reversed;
convictions affirmed;
cause remanded.

JUSTICE CUNNINGHAM took no part in the consideration or decision of this case.

CHIEF JUSTICE CLARK, specially concurring:

I specially concur.

I concur in the result only because I agree with the State that the defendant's attorney did not in fact request access to his client. If the attorney had actually requested access to his client, the failure to so inform the client of this fact would, in my opinion, render invalid the client's subsequent waiver of his State constitutional privilege against self-incrimination. I deal with each of these points in turn.

I

The State argues, to my mind convincingly, that the defendant's attorney, Anthony Rocco, did not request access to his client. Rocco testified at the suppression hearing. He failed to mention any attempt to speak with his client. While the opinion states that the defendant's wife testified that Rocco had "related [to her] his unsuccessful efforts to see the defendant" (slip op. at 5), it does not state what these efforts were. Officer Meese testified only that Rocco called him and asked to be notified before the defendant was placed in a lineup. He further testified that he did in fact call Rocco and attempt to notify him of the lineup, leaving a message on Rocco's answering machine.

On cross-examination, Rocco asked Meese whether he, Rocco, had also told Meese that he wanted to see and speak with the defendant before interrogation. Meese denied this. Only during his closing argument on the motion to suppress did Rocco directly assert that he had asked to see the defendant.

It is elementary that the factual determinations of the trial court on a motion to suppress are not to be overturned unless manifestly erroneous. (*People v. Clark*

(1982), 92 Ill. 2d 96, 99.) The trial court here was entitled to conclude that Meese's testimony as to what Rocco had said was more credible than the defendant's wife's hearsay account of what Rocco told her he had said to Meese. As for Rocco's statement during closing argument, these were not evidence. (See *People v. Carlson* (1982), 92 Ill. 2d 440, 449.) The appellate court's contrary conclusion was based upon a misreading of the record; it is simply not true that the "defendant's attorney * * * *testified* at the pretrial hearing on the defendant's motion to suppress the defendant's statements that he asked to talk to the defendant when he spoke with Officer Meese on the telephone." (Emphasis added.) (147 Ill. App. 3d 323, 336.) He did not testify; at best, he alleged.

I would therefore reverse the appellate court on the ground that the claimed effort to prevent the attorney from conferring with his client simply did not take place. I also agree with the majority that the defendant's other claims of error are erroneous. There was no affirmative finding of a physical confrontation by the Schiller Park officers, and Meese's statement about the police report had some basis in fact. Further, I agree that the defendant, who is white, has no standing to assert a *Batson* violation based on the exclusion of black jurors. (*Batson v. Kentucky* (1986), 476 U.S. 79, 90 L. Ed. 2d 69, 106 S. Ct. 1712.) However, since the majority has chosen to address the attorney access issue, I take this opportunity to express my own view on its merits.

II

From time immemorial the practice of holding suspects *incommunicado* has been rightfully abhorred. Courts have viewed with suspicion efforts to prevent lawyers from meeting with their arrested clients, even where the client has not formally invoked his right to meet with the lawyer. In fact, continued interrogation of a client

who has not been informed of his attorney's contemporaneous efforts to meet with him has been nearly universally condemned.

The endorsement of such interrogation inevitably degrades and deforms our adversary system of criminal justice. It encourages law enforcement officials to treat the defendant's attorney as a supernumerary figure, an inconsequential busybody whose efforts on behalf of his client can be—and undoubtedly will be—rejected with contempt. It simultaneously weakens the client's ability to make a knowing and intelligent waiver of his rights by depriving him of a critical piece of information.

Such interrogation conflicts with an adversarial system of justice. It offends against traditional notions of justice and fair play.

I am therefore sorry to see the majority endorse this practice.

As I understand the majority's opinion, it holds either: (1) that the constitutional guarantee against self-incrimination contained in our State Constitution does not prohibit the police from denying an attorney access to his client, or (2) that our State Constitution prohibits only the denial of access to an attorney who is actually present at the site of interrogation, but not to an attorney who merely telephones the station house. Whichever is the court's actual holding, I do not agree.

To understand the nature of my disagreement it is necessary to review some of the prior case law. A review of that history demonstrates that we are not compelled by *Moran v. Burbine* (1986), 475 U.S. ——, 89 L. Ed. 2d 410, 106 S. Ct. 1135, to adopt an overly restrictive view of our own constitutional privilege against self-incrimination.

In *Escobedo v. Illinois* (1964), 378 U.S. 478, 12 L. Ed. 2d 977, 84 S. Ct. 1758, the United States Supreme

Court held that a police refusal to honor the defendant's request to consult with his lawyer during a custodial interrogation violated the defendant's sixth amendment right to the assistance of counsel. In *Escobedo* the defendant was arrested and taken to police headquarters. A lawyer retained to represent the defendant by the defendant's mother arrived shortly thereafter. When the lawyer attempted to see his client he was rebuffed both by the desk sergeant and by the homicide detectives who were interrogating the defendant. Several times the defendant asked the interrogating detectives whether he could see his lawyer, but each time the detectives told him that his lawyer did not want to see him. The defendant's eventual confession was admitted, and his motion to suppress was denied.

In *Escobedo*, the Supreme Court, basing its decision solely on the sixth amendment right to counsel, held that the defendant's confession should be suppressed where the suspect requests and has been denied an opportunity to consult with his lawyer, and where the police have not effectively warned him of his absolute constitutional right to remain silent. (378 U.S. 478, 491, 12 L. Ed. 2d 977, 986, 84 S. Ct. 1758, 1765.) However, the fact that the police had also denied the *lawyer's* requests to see his client did not pass unnoticed. The Court clearly stated that "it 'would be highly incongruous if our system of justice permitted the district attorney, the lawyer representing the State, to extract a confession from the accused while his own lawyer, seeking to speak with him, was kept from him by the police.'" 378 U.S. 478, 487, 12 L. Ed. 2d 977, 984, 84 S. Ct. 1758, 1763, quoting *People v. Donovan* (1963), 13 N.Y.2d 148, 152, 193 N.E.2d 628, 629.

While *Escobedo* was partially superseded by the Supreme Court's decision in *Miranda v. Arizona* (1966), 384 U.S. 436, 16 L. Ed. 2d 694, 86 S. Ct. 1602, the Court clearly indicated that *Escobedo* retained independent significance. After summarizing the facts of *Escobedo*, the Court stated: "The police also prevented the attorney from consulting with his client. Independent of any other constitutional proscription, this action constitutes a violation of the Sixth Amendment right to the assistance of counsel and excludes any statement obtained in its wake." (384 U.S. 436, 465 n.35, 16 L. Ed. 2d 694, 718 n.35, 86 S. Ct. 1602, 1623 n.35.) Even in decisions later than *Miranda*, the Supreme Court continued to view *Escobedo* as a distinct holding, although it now viewed it as rooted in the fifth amendment privilege against self-incrimination rather than the sixth amendment right to counsel. See, *e.g.*, *Kirby v. Illinois* (1972), 406 U.S. 682, 689, 32 L. Ed. 2d 411, 417, 92 S. Ct. 1877, 1882.

Given this background it is far from surprising that the vast majority of State courts examining this issue prior to *Burbine* held that a suspect's waiver of *Miranda* rights would not be valid if the police neglected or refused to inform the suspect that his attorney was attempting to assist him. See, *e.g.*, *Weber v. State* (Del. 1983), 457 A. 2d 674; *Haliburton v. Florida* (Fla. 1985), 476 So. 2d 192; *State v. Matthews* (La. 1982), 408 So. 2d 1274; *Lodowski v. Maryland* (1985), 302 Md. 691, 490 A.2d 1228; *Commonwealth v. McKenna* (1969), 355 Mass. 313, 244 N.E.2d 560; *Lewis v. State* (Okla. App. 1984), 695 P.2d 528; *State v. Haynes* (1979), 288 Or. 59, 602 P.2d 272; *Commonwealth v. Hilliard* (1977), 471 Pa. 318, 370 A.2d 322 (plurality opinion); *Dunn v. State* (Tex. Crim. App. 1985), 696 S.W.2d 561; *State v. Jones* (1978), 19 Wash. App. 850, 578 P.2d 71.

The Illinois Supreme Court likewise held that "when police, prior to or during custodial interrogation, refuse an attorney appointed or retained to assist a suspect access to the suspect, there can be no knowing waiver of the right to counsel if the suspect has not been informed that the attorney was present and seeking to consult with him." (*People v. Smith* (1982), 93 Ill. 2d 179, 189.)

While the United States Supreme Court has now held that the Federal Constitution does *not* require the police to inform a suspect of an attorney's efforts to reach him, the Court carefully stated that "[n]othing we say today disables the States from adopting different requirements for the conduct of its employees and officials as a matter of state law." *Moran v. Burbine* (1986), 475 U.S. ——, ——, 89 L. Ed. 2d 410, 425, 106 S. Ct. 1135, 1145.

The majority declines to accept this invitation to read our State constitutional privilege (Ill. Const. 1970, art. I, sec. 10) more broadly than the Federal privilege. This, of course, it is entitled to do. But I am troubled that the majority has not only declined to accept the invitation but has declined it in such a peremptory fashion. Surely a question involving the interpretation of our own constitution by its ultimate arbiter deserves longer shrift.

I have already written at length on the basis of our right to give our State constitutional guarantees a more liberal interpretation than the corresponding guarantees in the Federal Constitution (*People v. Tisler* (1984), 103 Ill. 2d 226 (Clark, J., specially concurring)), and I see no need to repeat those arguments. But I do note that they have particular application to this case. It is one thing for us to seek guidance from the Supreme Court's constitutional decisions when those decisions are predictable and consistent. It is another to follow blindly where the Court itself has retreated from positions previously taken.

As the foregoing demonstrates, *Moran v. Burbine* is not simply an application of long established principles. Instead, it is a significant shift in the direction of the Supreme Court's thinking, and a direct repudiation of its statements in *Escobedo* and *Miranda*. It was no accident that nearly every State, not excluding Illinois, read those statements to mean that the undisclosed denial of attorney access would render a *Miranda* waiver invalid. Indeed, *Burbine* arguably overrules *Escobedo*, since it deprives the case of any significance other than that of precursor to *Miranda*. More profoundly, *Burbine* transforms *Miranda* from the defendant's shield into the prosecutor's sword. The presence of *Miranda* warnings will now apparently excuse police conduct which many State courts (see, *e.g.*, *People v. Donovan* (1963), 13 N.Y.2d 148, 193 N.E.2d 628) found unacceptable even before *Miranda* was decided.

Given this history, it is incumbent upon us to undertake our own examination of whether denial of attorney access violates our State constitutional privilege against self-incrimination. For several reasons, I believe that it does.

First, while *People v. Smith* (1982), 93 Ill. 2d 179, did not mention the State Constitution as an alternate ground for its decision, it cited and discussed two cases which *did* rely on their own constitutions, *State v. Haynes* (1979), 288 Or. 59, 602 P.2d 272, and *State v. Matthews* (La. 1982), 408 So. 2d 1274. (See also *Lewis v. State* (Okla. 1984), 695 P.2d 528; *Dunn v. State* (Tex. Crim. App. 1985), 696 S.W.2d 561.) Indeed, this use of State constitutions was prominently mentioned in *Smith* itself. 93 Ill. 2d 179, 188.

Second, since *Burbine* was decided, at least one State court has declined to follow it, holding that its own privilege against self-incrimination affords defendants greater protection. *People v. Houston* (1986), 42 Cal. 3d 595, 724 P.2d 1166, 230 Cal. Rptr. 141.

Third, article I, section 10, of the Illinois Constitution of 1970 was adopted during a high-water mark of political liberalism, prior to *Burbine*. To say that *Burbine* must determine our interpretation of our own constitution is, therefore, to credit those who ratified it with clairvoyance. Moreover, our constitution was adopted after *Escobedo* and *Miranda*, at a time when the United States Supreme Court itself had indicated that prevent-

ing an attorney from seeking his client violated the Federal Constitution, and when all State courts held the same. Interestingly, the committee presentation on section 10 was given to the 1970 constitutional convention by Bernard Weisberg, who had argued *Escobedo* for the defendant. (3 Record of Proceedings, Sixth Illinois Constitutional Convention 1376-77.) He, and the other members of the committee, could not have been unaware of the decision in that case.

Finally, and most importantly, there are strong policy reasons for holding that a defendant should be informed of his attorney's attempts to see him. In general, the State bears the burden of proving that a waiver of constitutional rights is valid. (*See, e.g., Brewer v. Williams* (1977), 430 U.S. 387, 51 L. Ed. 2d 424, 97 S. Ct. 1232.) An attorney's communication to the police about his client is an event which has a direct bearing upon whether a waiver is knowing or intelligent. For, "[t]o pass up an abstract offer to call some unknown lawyer is very different from refusing to talk with an identified attorney actually available to provide at least initial assistance and advice, whatever might be arranged in the long run. A suspect indifferent to the first offer may well react quite differently to the second." (*State v. Haynes* (1979), 288 Or. 59, 72, 602 P.2d 272, 278.) It is significant that the American Bar Association filed an *amicus* brief on the defendant's behalf in *Burbine*, and that the ABA standards for criminal justice mandate that a lawyer be allowed to see his client. (ABA Standards for Criminal Justice secs. 5—5.1, 5—7.1 (2d ed. 1980).) Beyond this, acceptance of *Burbine* would seem to lead to the proposition that the police have an absolute right to hold suspects *incommunicado*.

I also cannot accept the majority's attempt to distinguish between personal visits and telephone calls. While it is true that *Smith* involved an attorney who appeared at the station house, the court in *Smith* favorably cited

two cases. *State v. Matthews* (La. 1982), 408 So. 2d 1274, and *State v. Jones* (1978), 19 Wash. App. 850, 578 P.2d 71, which did involve telephone calls. Nor should the manner of attempted communication make any difference. In an age of modern transportation and communication, an attorney who telephones is very nearly as "available" to speak with the defendant as an attorney who has actually arrived at the station house. In any case, I note that the majority's attempt to distinguish *Smith* preserves for later consideration the issue of whether our State Constitution grants a broader privilege against self-incrimination in cases where the attorney is actually present.

JUSTICE SIMON, dissenting:

"Confessions of the accused are among the most powerful weapons employed in the prosecution of crimes. Nothing else can equal the impact upon the fact finder of an apparent admission of guilt by the party charged." (2 J. Cook, Constitutional Rights of the Accused 21 (2d ed. 1986); *People v. Prohaska* (1956), 8 Ill. 2d 579, 585 (confession of guilt is evidence of a "high and convincing character").) Therefore, courts must endeavor to ensure that confessions that reach the jury are reliable and voluntary products of police investigation and interrogation. The procedures used by the police in this case to obtain defendant's confession—physical force, misrepresentation, and separation of counsel and client—undermine the reliability of the resulting confession and are impermissible under both State and Federal law. The trial court's failure to suppress the resulting nonvoluntary confession constitutes error entitling defendant to a new trial. In addition, because all prospective black jurors were kept from service on the jury through the State's use of peremptory challenges, defendant is entitled at the very least to a hearing on whether those jurors were unconstitutionally excluded from the jury which convicted him in violation of *Batson v. Kentucky* (1986), 476

U.S. 79, 90 L. Ed. 2d 69, 106 S. Ct. 1712. See also *Griffith v. Kentucky* (1987), 479 U.S. ——, 93 L. Ed. 2d 649, 107 S. Ct. 708 (*Batson* applies retroactively to cases where the conviction had not become final before the new rule was announced).

A review of the circumstances surrounding defendant's confession to the Des Plaines police reveals three factors which combined to induce defendant's involuntary confession: physical injuries suffered by defendant while in the custody of the Schiller Park police, misrepresentations made to defendant by the Des Plaines police in order to induce defendant to confess, and the separation of defendant and his attorney during the period of police interrogation. I will address each of these factors separately.

At the suppression hearing, defendant testified that he was beaten by Schiller Park police. He described two episodes of brutality in which he was kicked, hit, and knocked to the ground, punched and beaten with a nightstick, raised off the floor by elevating his handcuffed arms behind him, and his hair was pulled. Defendant testified that as a result he suffered pain in his ribs and in his right knee, and that he lost tufts of hair. Defendant's claims of mistreatment were corroborated by his attorney's testimony that at their first meeting defendant told him that he had been beaten and showed the attorney his visibly injured knee. Defendant received no medical treatment for his injuries while at the Schiller Park or Des Plaines police stations on the day of his interrogation and confession. After a medical examination at Cermak Hospital the following day, defendant was informed that he probably had fractured ribs in the midchest area, advised to treat his injured knee with sitz baths, and given pain medication. After hearing all the evidence at the suppression hearing, the trial judge determined that the "apparently very severe physical confrontation" between defendant and the police warranted

suppression of inculpatory statements made by defendant at the Schiller Park police station. The trial judge declined to suppress statements made at the Des Plaines station, however, in part because no additional physical cruelty was proven to have been exerted against defendant in Des Plaines.

It is axiomatic that confessions obtained through physical brutality or force may not be used as evidence to secure a conviction against the accused. (*Brown v. Mississippi* (1936), 297 U.S. 278, 285-86, 80 L. Ed. 682, 687, 56 S. Ct. 461, 464-65; *People v. O'Leary* (1970), 45 Ill. 2d 122, 125; *People v. Davis* (1966), 35 Ill. 2d 202, 205; *People v. Cunningham* (1964), 30 Ill. 2d 433, 436; *People v. Prohaska* (1956), 8 Ill. 2d 579, 585; *People v. Davis* (1948), 399 Ill. 265, 271.) In addition, brutality may render inadmissible not only inculpatory statements made by the accused during the beating or mistreatment, but also statements made later which are deemed to be tainted by the earlier brutality. *People v. Thomlison* (1948), 400 Ill. 555; *People v. Santucci* (1940), 374 Ill. 395.

Here, the defendant confessed within approximately six hours of sustaining significant injuries while in the custody of the Schiller Park police. When asked "Did you confess because * * * you were hurt?" the defendant replied, "Yes, I wanted people to just leave me alone." That defendant suffered no additional physical brutality at the Des Plaines station (a fact which defendant disputes) does not vitiate the physical coercion to which defendant had already been subjected, especially because at the time of his confession defendant had received no medical treatment for his injuries. In view of these circumstances, the numerous *Miranda* warnings defendant received before confessing, and his experience in dealing with the police, could not cure the coercive effect of the actions of the Schiller Park police. Therefore, defendant's Des Plaines confession was tainted by the physical

confrontation in Schiller Park, and the trial court erred in concluding that the confession was admissible.

The majority's suggestion that "there can be no coercion available to infect [defendant's statements]" in the "absence of an affirmative finding of physical coercion" (slip op. at 14) is not accurate. Here, it is uncontroverted that defendant sustained numerous injuries while in the hands of Schiller Park police. The trial court's finding that a "very severe physical confrontation" had taken place necessarily includes a finding of coercion; otherwise, the trial court would not have suppressed defendant's statements. In this light, the majority's insistence on an "affirmative finding" of brutality is little more than a semantic game.

The second factor which rendered defendant's confession inadmissible is the subterfuge used by the Des Plaines police to coerce defendant into confessing. Officer Meese of the Des Plaines police admitted at trial that he made untrue statements to defendant during the interrogation which led to defendant's confession. Specifically, Meese told defendant that the Des Plaines police had received a report identifying his car at the scene of the crime:

> "At that time I indicated to him that we were notified by the City of Chicago that his vehicle was observed in the alley involved in a rape incident, and that he could not be identified, but that he would have to explain why the vehicle was there."

Meese's misrepresentation achieved its desired result. Although defendant had already given a statement denying involvement in the crime, defendant gave another statement following Meese's subterfuge in which he confessed.

In *Miranda v. Arizona* (1966), 384 U.S. 436, 476, 16 L. Ed. 2d 694, 725, 86 S. Ct. 1602, 1629, the United States Supreme Court stated that:

> "[A]ny evidence that the accused was threatened, tricked, or cajoled into a waiver [of the fifth amendment privilege against self-incrimination] will, of course, show that the defendant did not voluntarily waive his privilege."

(See also *Moran v. Burbine* (1986), 475 U.S. 412, 421, 89 L. Ed. 2d 410, 421, 106 S. Ct. 1135, 1141 (relinquishment of *Miranda* rights "must have been voluntary in the sense that it was the product of a free and deliberate choice rather than intimidation, coercion or deception"); see, *e.g.*, *People v. Hogan* (1982), 31 Cal. 3d 815, 647 P.2d 93, 183 Cal. Rptr. 817 (confession inadmissible due to misrepresentation); *State v. Howard* (Tenn. Crim. App. 1981), 617 S.W.2d 656 (same); *Commonwealth v. Meehan* (1979), 377 Mass. 552, 387 N.E.2d 527 (same).) In assessing whether misrepresentation renders a defendant's confession involuntary and therefore inadmissible this court has applied a totality-of-circumstances test. Under this test misrepresentation is only a factor to be considered, along with "age, education and intelligence of the accused, the duration of questioning, and whether he received his constitutional rights or was subjected to any physical punishment." *People v. Kashney* (1986), 111 Ill. 2d 454, 466-67, quoting *People v. Martin* (1984), 102 Ill. 2d 412, 427.

Applying this test to the facts in this case compels the conclusion that defendant's confession was inadmissible. Not only had the defendant been subjected to severe physical brutality, but also he was kept incommunicado from his attorney in violation of his constitutional rights. In addition, defendant had been in police custody since early that morning and had been questioned by two different police departments and at least two assistant State's Attorneys. The fact that defendant had received repeated *Miranda* warnings is of little significance in the face of these coercive conditions and the extended interrogation to which the defendant was subjected.

Based on its reading of *Spano v. New York* (1959), 360 U.S. 315, 3 L. Ed. 2d 1265, 79 S. Ct. 1202, and *Lynumn v. Illinois* (1903), 372 U.S. 528, 9 L. Ed. 2d 922, 83 S. Ct. 917, the majority concludes that the subterfuge employed by Officer Meese did not coerce the defendant's confession because it was "not employed to suggest that the defendant would suffer physical, emotional, or material harm" or that "the defendant or a loved one would be harmed in some way" if the defendant refused to confess. (Slip op. at 13.) This is an overly narrow reading of *Lynumn* and *Spano;* these cases did not establish a requirement that the defendant or his loved ones be directly threatened with harm before a misrepresentation can be deemed to have a coercive effect powerful enough to invalidate defendant's confession. Instead, the central inquiry under *Spano* and *Lynumn* is whether, considering the totality of circumstances, the defendant's will was overborne by the techniques employed by the police in obtaining the confession. (*Spano*, 360 U.S. at 323, 3 L. Ed. 2d at 1271-72, 79 S. Ct .at 1207; *Lynumn*, 372 U.S. at 534, 9 L. Ed. 2d at 926, 83 S. Ct. at 920.) Under this approach, defendant need not establish threats of the same directness or magnitude as those in *Spano* or *Lynumn* in order to establish that his will was overborne. Here, the effect of the officer's subterfuge, which falsely implied that the police had eyewitness evidence against defendant, must be judged in light of the facts that defendant was suffering physical injuries and had already been interrogated and given an exculpatory statement. Under these circumstances, defendant's confession cannot be characterized as "the product of a rational intellect and a free will.'" *Lynumn*, 372 U.S. at 534, 9 L. Ed. 2d at 926, 83 S. Ct. at 920, quoting *Blackburn v. Alabama* (1963), 361 U.S. 199, 208, 4 L. Ed. 2d 242, 249, 80 S. Ct. 274, 280); *People v. Kincaid* (1981), 87 Ill. 2d 107, 117.

Even before the United States Supreme Court announced its decision in *Miranda v. Arizona* prohibiting

trickery in obtaining confessions, this court had denounced the use of trickery and falsehood to coerce a defendant's confession. (See *People v. Stevens* (1957), 11 Ill. 2d 21, 27.) We should continue to denounce and deter these practices by rendering the fruit of such tactics inadmissible, especially where, as here, defendant's confession was elicited through knowing and deliberate misrepresentation by the police with the specific intent to induce defendant's confession. See *Spano*, 360 U.S. at 324, 3 L. Ed. 2d at 1272, 79 S. Ct. at 1207 (where an "undeviating intent of the officers to extract a confession * * * is shown * * * the confession obtained must be examined with the most careful scrutiny"); see also *People v. Kashney* (1986), 111 Ill. 2d 454, 467 (Goldenhersh, J., concurring in part and dissenting in part) (contending that use of deceptive practices by the police in obtaining confessions violates *Miranda*); *People v. Martin* (1984), 102 Ill. 2d 412, 429 (Goldenhersh, J., dissenting) (same).

The third factor which indicates that defendant's confession was improperly obtained and should be suppressed is the way in which the defendant was kept incommunicado from his attorney. I agree with Chief Justice Clark's analysis of this issue in the specially concurring opinion, and thus will not repeat those arguments here. I disagree with the special concurrence, however, on two points. First, there was sufficient evidence to establish that defendant's attorney requested access to defendant during the interrogation period. Defendant's wife testified at the suppression hearing that the attorney had attempted to contact the defendant. Also, although the attorney's closing statement in the suppression hearing (in which he detailed his attempts to contact defendant) was not sworn testimony, as an officer of the court the attorney was under a continuing ethical duty to speak truthfully, and we have no reason to doubt his veracity. Furthermore, the trial court recognized that he was in-

troducing facts in his closing not presented in testimony, but allowed him to continue over the State's objection. Under these circumstances the attorney had every reason to believe his statement was being accepted by the court as the functional equivalent of testimony, and I would regard the statement as such. His attempts to contact his client were also enumerated in the written motion to suppress defendant's confession filed before the suppression hearing. Moreover, as the appellate court noted, the testimony of the officer who claimed that the attorney had not requested access to the defendant had been severely discredited.

Second, because of a critical factual difference between this case and *Moran v. Burbine* (1986), 475 U.S. 412, 89 L. Ed. 2d 410, 106 S. Ct. 1135, I am not convinced that *Burbine* controls the result here under Federal law. In *Burbine*, the defendant never expressed any desire for an attorney. The Court repeatedly noted the significance of this factor in its decision: "At no point during the course of the investigation * * * did [defendant] request an attorney * * * he '[did] not want an attorney called or appointed' * * * he had access to a telephone, which he apparently declined to use * * * he at no point requested the presence of a lawyer." (475 U.S. at 415, 417-18, 420, 89 L. Ed. 2d at 417, 418, 420, 106 S. Ct. at 1138, 1139, 1141.) The Court also reiterated the *Miranda* requirement that "[i]f the individual indicates *in any manner, at any time prior to* or during questioning, that he wishes to remain silent, [or if he] states that he wants an attorney, the interrogation must cease." (Emphasis added.) (475 U.S. at 420, 89 L. Ed. 2d at 420, 106 S. Ct. at 1141, quoting *Miranda v. Arizona* (1966), 384, U.S. 436, 473-74, 16 L. Ed. 2d 694, 723, 86 S. Ct. 1602, 1627.

In the present case it is undisputed that a Schiller Park police officer called defendant's wife from the station and discussed defendant's arrest and bail with her. The officer then put defendant on the line, at which time

defendant instructed his wife to retain a specific attorney in his behalf. Thus, in this case, unlike *Burbine*, it is uncontested that defendant had actively sought the advice and counsel of an attorney prior to interrogation and confession. Defendant in this case, unlike the defendant in *Burbine*, had every expectation that an attorney would be contacting him. Defendant was persuaded to confess only after the police had successfully kept the defendant and his attorney separated prior to and during the interrogation period. Perhaps defendant lost hope that the attorney would actually appear for his defense, or without the benefit of counsel simply gave in to the pressure to confess exerted by his interrogators.

Also, the Court in *Burbine* noted as significant that there was no evidence of physical coercion, and that the defendant initiated the confession conversation. In contrast, defendant in the present case had been physically injured at the hands of police only a few hours earlier, and had already been subjected to repeated interrogation initiated by the police before he confessed. I would hold, therefore, that because of the critical factual differences between *Burbine* and the present case, *Burbine* does not control the result in this case. We should look to the United States Supreme Court's earlier statements in *Miranda* and *Escabedo*, as discussed in the special concurrence, for the resolution of the separation of attorney and client issue. See, *e.g.*, *Miranda*, 384 U.S. at 746, 16 L. Ed. 2d at 724-25, 86 S. Ct. at 1629 ("Whatever the testimony of the authorities as to waiver of rights by an accused, the fact of lengthy interrogation or incommunicado incarceration before a statement is made is strong evidence that the accused did not validly waive his rights").

In sum, it is clear that the combined conduct of the Schiller Park and Des Plaines police in this case rendered defendant's confession involuntary and that the

confession therefore should be suppressed. In the words of Chief Justice Earl Warren:

> "The abhorrence of society to the use of involuntary confessions does not turn alone on their inherent untrustworthiness. It also turns on the deep-rooted feeling that the police must obey the law while enforcing the law; that in the end life and liberty can be as much endangered from illegal methods used to convict those thought to be criminals as from the actual criminals themselves." *Spano v. New York* (1959), 360 U.S. 315, 320-21, 3 L. Ed. 2d 1265, 1270, 79 S. Ct. 1202, 1205-06.

Even if defendant's confession could be deemed voluntary and admissible, defendant's conviction is still drawn into question by the State's use of peremptory challenges to exclude black persons from the jury. Two black potential jurors, the only black persons on a venire of 40 people, were eliminated by the State through the exercise of its peremptory challenges, resulting in an all-white jury. Defendant contends that the exclusion of black persons from the jury violated his fourteenth amendment right to equal protection of the laws and his right to a jury selected from a representative cross-section of the community under the sixth amendment. The majority concludes that defendant does not have standing to assert a *Batson* violation on equal protection grounds because he is white and the excluded prospective jurors are black, and dismisses defendant's sixth amendment arguments as precluded by this court's earlier rulings.

Even if *Batson* forecloses challenges to the discriminatory use of peremptory challenges under an equal protection analysis when the defendant is not a member of the class excluded from the jury, it in no way endorses the continued discriminatory exclusion of black people from juries. The *Batson* Court noted that the use of peremptory challenges to exclude black persons was impermissible based on three factors: harm to the defendant, harm to the juror, and harm to the community. Minorities, according to the Court, have an interest independent from the defendant's in serving as jurors:

> "Racial discrimination in selection of jurors harms not only the accused whose life or liberty they are summoned to try. * * * A person's race simply "is unrelated to his fitness as a juror.' [Citation.] As long ago as *Strauder*, therefore, the Court recognized that by denying a person participation in jury service on account of his race, the State unconstitutionally discriminated against the excluded juror." (*Batson*, 476 U.S. at ——, 90 L. Ed. 2d at 81, 106 S. Ct. at 1717-18.)

The community also has an interest in preventing discriminatory exclusion from jury service:

> "The harm from discriminatory jury selection extends beyond that inflicted on the defendant and the excluded juror to touch the entire community. Selection procedures that purposefully exclude black persons from juries undermine public confidence in the fairness of our system of justice. *Batson*, 476 U.S. at ——, 90 L. Ed. 2d at 81, 106 S. Ct. at 1718.

The Supreme Court used sweeping language throughout *Batson* in renouncing as unconstitutional exclusion of black persons from the jury, evincing a commitment to prohibit discriminatory exclusion tactics in their entirety: "the Constitution prohibits *all forms* of purposeful racial discrimination in the selection of jurors." (Emphasis added.) (476 U.S. at ——, 90 L. Ed. 2d at 82, 106 S. Ct. at 1718.) The Court noted that in many State and Federal courts "the [peremptory] challenge may be, and unfortunately at times has been, used to discriminate against black jurors," and concluded that "[i]n view of the heterogeneous population of our nation, public respect for our criminal justice system and the rule of law

will be strengthened if we ensure that no citizen is disqualified from jury service because of his race." 476 U.S. at ——, 90 L. Ed. at 89, 106 S. Ct. at 1724.

Furthermore, the *Batson* Court made clear that the prohibition against discriminatory tactics now applies not only to the selection of the jury panel or venire, but equally to the selection of the petit jury. "While decisions of this Court have been concerned largely with discrimination during selection of the venire, *the principles announced there also forbid discrimination on account of race in the selection of a petit jury.*" (Emphasis added.) (476 U.S. at ——, 90 L. Ed. 2d at 82, 106 S. Ct. at 1718.) Thus, fair venire selection is only the threshold requirement for properly selecting a jury. The State cannot be allowed, after seating a proper venire, to pervert the jury selection process by using peremptory challenges to ensure that minorities are kept off the jury. *Batson*, 476 U.S. at ——, 90 L. Ed. 2d at 82, 106 S. Ct. at 1718 ("the State may not draw up its jury lists pursuant to neutral procedures but then resort to discrimination at 'other stages in the selection process' ").

A logical extension of the language in *Batson* would prevent exclusion of black people from the jury through the use of peremptory challenges regardless of whether the defendant is a member of the excluded class, based on the juror's and the community's independent interests in a fairly selected jury, as well as the defendant's interest. Defendant has suggested the proper rationale for the extension of the principle: defendant's sixth amendment right to a representative cross-section of the community on the jury. A sixth amendment challenge is particularly appropriate in the present case, where the defendant is white and the excluded jurors are black, because a defendant need not be a member of the excluded class in order to raise a fair cross-section challenge. *Duren v. Missouri* (1979), 439 U.S. 357, 359 n.1, 58 L. Ed. 2d 579, 583 n.1, 99 S. Ct. 664, 666 n.1; *Peters v. Kiss* (1972), 407 U.S. 493, 33 L. Ed. 2d 83, 92 S. Ct. 2163 (white defendant could raise sixth amendment claim based on the exclusion of blacks).

Under the sixth amendment, a defendant is entitled to a fair cross-section of the community on the jury. (*Taylor v. Louisiana* (1975), 419 U.S. 522, 42 L. Ed. 2d 690, 95 S. Ct. 692.) This has been interpreted to guarantee that the jury venire be selected in a nondiscriminatory manner from a source fairly representative of the community, even though Taylor does not go so far as to guarantee a representative petit jury. But as already mentioned, *Batson* has added an additional dimension to this analysis: although a petit jury selected from a proper panel need not necessarily reflect a cross-section of the community, discriminatory tactics designed to manipulate the ultimate composition of the petit jury will no longer be tolerated. As the United States Court of Appeal for the Second Circuit phrased it in *Roman v. Abrams* (2d Cir. 1987), 822 F.2d 214, 226, 229:

> "[T]he sixth amendment guarantees only the *possibility* of a petit jury reflecting a cross section of the community and forbids the prosecutor to exercise his peremptories discriminatorily in a manner that eliminates that possibility. * * * [W]hat the sixth amendment guarantees to a defendant is not that he will have a petit jury of any particular composition but that he will have the *possibility* of a jury that reflects a fair cross section of the community. The prosecutor violates sixth amendment rights when he starts out to eliminate that possibility." (Emphasis in original.)

The *Roman* court also articulated the *prima facie* showing that should be required for a defendant to establish a violation of the sixth amendment right to the possibility of a fair cross-section on the petit jury. To establish a *prima facie* case, a defendant must show that

"'(1) the group alleged to be excluded is a cognizable group in the community, and (2) there is substantial likelihood that the challenges leading to this exclusion have been made on the basis of the individual venireperson's group affiliation rather than because of any indication of a possible inability to decide the case on the basis of the evidence presented.'" *Roman*, 822 F.2d at 223, 225, quoting *McCray v. Abrams* (2d Cir. 1984), 750 F.2d 1113, 1131-32).

I raised an argument challenging the use of discriminatory peremptory challenges in the selection of petit juries as violative of the sixth amendment fair cross-section requirement, as well as arguments that such challenges are forbidden under our State constitution and that this court should exercise its supervisory authority to ensure that discriminatory tactics are not successful in *People v. Payne* (1983), 99 Ill. 2d 135, 140 (Simon, J., dissenting). I will not repeat those arguments here except to note the effect that *Batson* has on this court's prior decistions rejecting a sixth amendment prohibition on the discriminatory use of peremptory challenges.

In the wake of *Batson*, nothing precludes this court from holding that the use of peremptory challenges to exclude black jurors, even where the defendant is not black, violates the fair cross-section requirement of the sixth amendment. The opinions relied on by the majority—*Payne*, *People v. Williams* (1983), 97 Ill. 2d 252, and *People v. Gaines* (1984), 105 Ill. 2d 79—were based on precedent that has now been overturned. In those cases defendants argued that use of peremptory challenges to exclude black people from the jury violated both their fourteenth amendment rights to equal protection and their sixth amendment right to a fair cross-section of the jury. In support of their sixth amendment arguments, the defendants relied on *Taylor v. Louisiana* (1975), 419 U.S. 522, 42 L. Ed. 2d 690, 95 S. Ct. 692, in which the United States Supreme Court held that the sixth amendment right to a jury trial includes the right to have a petit jury selected from a representative cross-section of the community. In all of those cases, however, this court held that an earlier Supreme Court case, *Swain v. Alabama* (1965), 380 U.S. 202, 13 L. Ed. 2d 759, 85 S. Ct. 824, must be read into *Taylor* and therefore that *Swain* controlled the resolution of the peremptory challenge issue under a sixth amendment analysis. Under *Swain*, an equal protection case, to establish discrimination in the use of peremptory challenges, a defendant was required to demonstrate systematic and purposeful exclusion of minorities in case after case. *Swain* has now been overruled by *Batson*, thereby, calling into question the holdings in those cases relying on Swain, including *Payne*, *Williams*, and *Gaines*. Thus, this court writes on a clean slate, and it would be incongruous for this court not to read the *Batson* decision into the sixth amendment analysis of *Taylor*—thereby prohibiting the use of peremptory challenges to exclude black persons from petit juries under the sixth amendment—after insisting for so long on reading *Swain* into *Taylor*.

It is not our concern to ponder the motivation for the State's attempt to exclude black persons from the jury in a particular case when the defendant is not black, but simply to ensure that it is not successful in doing so. Discrimination against black people is no less reprehensible simply because the defendant happens to be white. As acknowledged by the Supreme Court in *Batson*, black persons have an interest in serving as jurors independent from and in addition to the right of the defendant to a jury selected in a nondiscriminatory manner from a representative cross-section of the community, and interference with these rights should not be tolerated by this court for any reason.

In view of the long and unjustifiable history in this State of exclusion of black persons from jury service through the use of peremptory challenges (see *People v.*

Lewis (1984), 103 Ill. 2d 111, 122 (Simon, J., dissenting) (listing cases in which peremptory challenges were used to exclude potential black jurors); *People v. Payne* (1983), 99 Ill. 2d 135, 152 (Simon, J., dissenting) (same), I urge this court not to wait until the United States Supreme Court explicitly denounces the use of peremptory challenges to exclude minorities from the jury where the defendant is a nonminority, but instead to take the initiative, under the unequivocal condemnation of such procedures in *Batson*, in outlawing all discrimination against black persons in the jury selection system in this State. Some post-*Batson* courts have already held that discriminatory use of peremptory challenges is prohibited under the sixth amendment. See, *e.g.*, *Roman v. Abrams* (2d Cir. 1987), 822 F.2d 214; *Booker v. Jabe* (6th Cir. 1986), 801 F.2d 871; *Fields v. People* (Colo. 1987), 732 P.2d 1145.

At the very least this matter should be sent back to the trial court for a hearing to determine whether black persons were improperly excluded from service on the jury. For these reasons I respectfully dissent.

ILLINOIS SUPREME COURT
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Supreme Court Building
Springfield, Ill. 62706
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April 5, 1988

Cook County Public Defender

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Chicago, IL 60602

No. 64182—People State of Illinois, appellant, v. Daniel Holland, appellee. Appeal, Appellate Court, First District.

The Supreme Court today DENIED the petition for rehearing in the above entitled cause.

The mandate of this Court will issue to the appropriate Appellate Court and/or Circuit Court or other agency on April 15, 1988.

SUPREME COURT OF THE UNITED STATES

No. 88-5050

DANIEL HOLLAND,

Petitioner

v.

ILLINOIS

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ILLINOIS

ON CONSIDERATION of the motion for leave to proceed herein in forma pauperis and of the petition for writ of certiorari, it is ordered by this Court that the motion to proceed in forma pauperis be, and the same is hereby, granted; and that the petition for writ of certiorari be, and the same is hereby, granted.

February 27, 1989